obviously
ppellees'
be heard

30th day

N,
l Bridge

In the Supreme Court of the United States

October Term, 1938.

No. 704

American Toll Bridge Company, a Corporation,
Appellant,

vs.

Railroad Commission of the State of California, Wallace L. Ware, Frank R. Devlin, Ray L. Riley, Ray C. Wakefield and Leon O. Whitsell, as Members of and Constituting the Railroad Commission of the State of California,
Appellees.

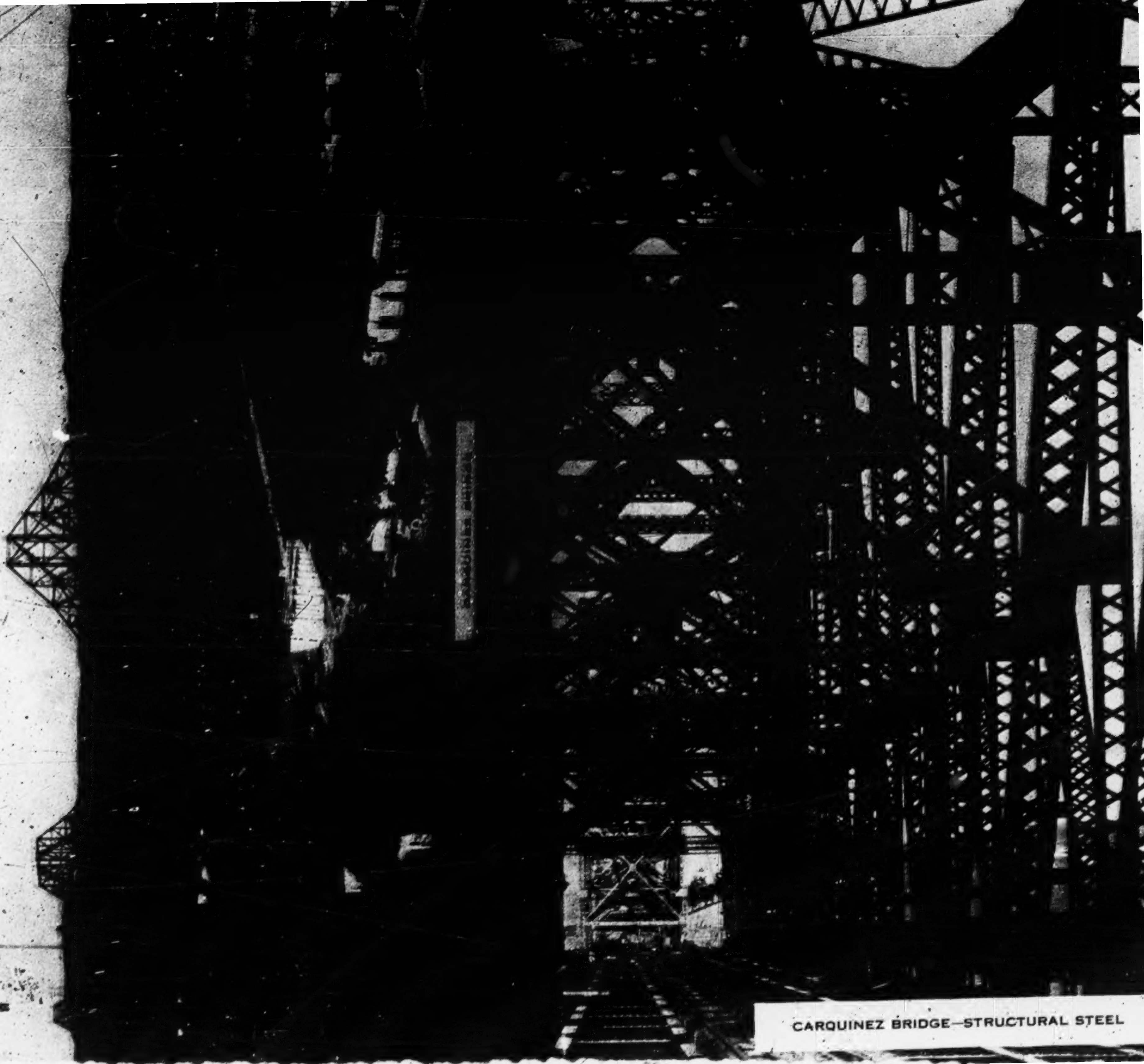
BRIEF OF APPELLANT.

Max Thelen,
San Francisco, California.
Counsel for Appellant.

Subject Index

Table of Cases and Text Books Cited

Table of Constitutional and Statutory Provisions Cited



CARQUINEZ BRIDGE—STRUCTURAL STEEL

PRINCIPAL AREA SERVED BY CARQUINEZ AND ANTIOCH BRIDGES

CARQUINEZ BRIDGE

ANTIOCH BRIDGE

In the Supreme Court of the United States

OCTOBER TERM, 1938.

No. 704

AMERICAN TOLL BRIDGE COMPANY, a Corporation,

Appellant,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, WALLACE L. WARE, FRANK R. DEVLIN, RAY L. RILEY, RAY C. WAKEFIELD and LEON O. WHITSELL, as Members of and Constituting the Railroad Commission of the State of California,

Appellees.

BRIEF OF APPELLANT.

OPINION IN COURT BELOW.

The opinion of the Supreme Court of California is officially reported, in pamphlet form, in 96 Cal. Dec. 367.

GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED

This is an appeal by American Toll Bridge Company (hereinafter called appellant) under Section 237(a) of the Judicial Code, U. S. C. A., Title 28, Section 344 (as amended by the Act of February 13, 1925, ch. 229, Section 1, 43 Stat. 936) and under the Act of January 31, 1928, ch. 14, 45 Stat. 54, and the Act of April 26, 1928, ch. 440, 45 Stat. 466, from a final judgment in a suit in the highest court of the State, to-wit, the Supreme Court of the State of California, in which suit there was drawn in question the validity of a certain order, legislative in character, of the Railroad Commission of the State of California, on the ground that said order was repugnant to the Constitution of the United States, particularly the provision of Section 10 of Article I thereof providing, in part, that no State shall pass any law impairing the obligation of contracts and the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, providing, in part, that no State shall deprive any person of property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

The order of the Railroad Commission of California was an order made and entered on February 8, 193[illegible] Decision No. 30,612 (R. 31) reducing the tolls charged and collected by appellant from passengers and automobiles using appellant's Carquinez Bridge, a toll bridge constructed and operated by appellant across the Straits of Carquinez between the Counties of Contra Costa and Solano, State of California.

In so acting, said Railroad Commission exercised delegated legislative authority. Said order of the Railroad Commission was final and was legislative in character.

The judgment of the Supreme Court of California sought to be reviewed herein was made and entered on the 27th day of September, 1938 (R. 122).

The Petition for Appeal was presented by appellant and filed and the Order Allowing Appeal herein was made and entered on the 28th day of October, 1938 (R. 197, 202).

A concise statement of the grounds on which the jurisdiction of this Court is invoked is as follows:

1. The Supreme Court of California erred in holding and deciding that the Railroad Commission's said order did not impair the obligation of the contract between appellant and the State of California, evidenced by Ordinance No. 171 (Appendix No. 1 to this Brief) of the Board of Supervisors of Contra Costa County, California, including the provisions of existing statutes which were read into and became a part of said contract, and the acceptance of the provisions of said Ordinance by appellant's assignor, within the meaning of Section 10 of Article I of the Constitution of the United States.

2. The Supreme Court of California erred in holding and deciding that the procedure of the Railroad Commission did not constitute a denial of procedural due process of law for each of the reasons specified in the Assignment of Errors on file herein and here-

inafter more specifically set forth, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

3. The Supreme Court of California erred in holding and deciding that the Railroad Commission's said order did not confiscate the property of appellant in each respect specified in said Assignment of Errors and hereinafter more specifically set forth, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Said grounds appear in greater detail in said Assignment of Errors (R. 199-201), in appellant's Statement as to Jurisdiction, in Brief of Appellant in Opposition to Motion to Dismiss or Affirm heretofore filed herein, and in the subsequent portions of this Brief.

On March 13, 1939, this Court entered an order noting probable jurisdiction and denying the motion to dismiss or affirm.

STATEMENT OF CASE.

1. AMERICAN TOLL BRIDGE COMPANY'S TWO TOLL BRIDGES

American Toll Bridge Company owns and operates two toll bridges across the same water barrier, namely: the Carquinez Straits and the San Joaquin River in the State of California, as follows:

a. The Carquinez Bridge, between Crockett, in Contra Costa County, and an opposite point in Solano County; and

b. The Antioch Bridge, across the San Joaquin River near Antioch, between the Counties of Contra Costa and Sacramento, at a point about twenty-five miles east of the Carquinez Bridge.

For photographs of the Carquinez Bridge, see frontispiece.

These bridges are located only twenty-five miles apart and serve, in major part, the same territories and the same traffic at the same rates under competitive conditions. For map showing the location of said bridges, see frontispiece.

2. THE TOLL BRIDGE FRANCHISES.

The franchises for the construction and operation of said two bridges were granted by the Board of Supervisors of Contra Costa County in accordance with the provisions of Sections 2843 to 2858 and 2870 to 2881 of the Political Code of the State of California.

The franchise for the Carquinez Bridge was granted on February 5, 1923 and will expire on or about March 5, 1948 (Appendix No. 1 to this Brief).

The franchise for the Antioch Bridge was granted on June 4, 1923 and will expire on or about July 4, 1948 (Exh. 1, R. 209, 226).

Each franchise provides that upon its expiration the title to the toll bridge shall revert to the adjacent counties without the payment of any compensation to the Company (Appendix No. 1 to this Brief; Exh. 1, R. 209, 227).

Hence, only 9 years remain before American To
Bridge Company will lose its property in both bridg

3. OPENING OF BRIDGES TO TRAFFIC.

The Antioch Bridge was opened to traffic on Ja
uary 1, 1926 (Exh. 1, R. 209, 210).

The Carquinez Bridge was opened to traffic on M
21, 1927 (Exh. 1, R. 209, 210).

4. 1937 LEGISLATION.

In 1937, the Legislature of California, for the fi
time, enacted legislation declaring toll bridge cor
rations to be public utilities and providing for th
regulation by the Railroad Commission (St. 1937,
896, pp. 2473, 2478). This statute became effective
August 27, 1937.

Prior to August 27, 1937, the Railroad Commiss
had no authority of any kind over toll bridge c
porations.

Ever since the enactment of the Political Code
1872, the tolls charged by such corporations w
inserted by the Boards of Supervisors of the app
priate counties into the ordinances granting the fr
chises and were subject to change only as specifie
Sections 2845 and 2846 of the Political Code. S
sections are hereinafter in this Brief set forth in f

Copy of said Act of July 1, 1937, in so far as it
lates to toll bridge corporations, is attached to
Brief as Appendix No. 2.

5. PROCEEDINGS BEFORE RAILROAD COMMISSION.

a. Institution of investigations.

On August 27, 1937, the Railroad Commission, on its own motion, in Case No. 4244 instituted an investigation into the operations, service, rates, tolls, rentals, charges, classifications, rules, regulations, contracts, practices, privileges and facilities, or any thereof, of American Toll Bridge Company, San Francisco Bay Toll Bridge Company and Dumbarton Bridge Co., owning and operating toll bridges across the waters of San Francisco Bay and tributaries. The Order specifically designated both the Carquinez and the Antioch Bridges of American Toll Bridge Company (R. 27).

Thereafter, on October 4, 1937, after the Commission's experts had been examining appellant's books for approximately a month, the Commission, in Case No. 4259, instituted another investigation into the rates, charges, contracts, classifications, rules and regulations, or any thereof, of American Toll Bridge Company. This investigation, however, was expressly limited to the Carquinez Bridge, and did not include the Antioch Bridge or either of the bridges of San Francisco Bay Toll Bridge Company or Dumbarton Bridge Co. (R. 30).

The initial hearing in both Cases was thereafter held on October 26, 1937. At that time, the Presiding Commissioner announced that the Commission intended to defer action in Case No. 4244 and to confine its inquiry to Case No. 4259, directed exclusively to the Carquinez Bridge (R. 203).

No complaint or answer were ever filed in said Case No. 4259 and at no time and in no way, prior to its decision, did the Railroad Commission ever advise appellant of the State's proposals.

b. Hearings and decision.

Hearings in said Case No. 4259 were held by the Railroad Commission on various dates between October 26, 1937 and January 28, 1938.

On February 8, 1938, the Railroad Commission made and filed its Decision No. 30,612 in said case (R. 31).

In said decision, the Railroad Commission reduced the tolls of the Carquinez Bridge alone (not including the Antioch Bridge) from 60¢ per automobile plus 10¢ per passenger to 45¢ per automobile plus 5¢ per passenger (R. 39). The evidence shows an average of 2.2 passengers per automobile (R. 280). Accordingly the Commission's reduction is from an average of 82 per automobile and passengers to 56¢, being a reduction of 26¢ per average automobile and passengers.

The reduction, if operative, will have the effect of reducing the gross revenue of the Carquinez Bridge from $1,552,934.00 in 1937 to only $1,143,520.00 in 1938, being a reduction of 26.4%. The reduction in the net income will be from $963,816.00 in 1937 to $570,298.00 in 1938, being a reduction of 40.8% (Exh. 13 Table 4, col. 1937, R. 491, 493; this Brief, page 148

c. Petition for rehearing.

On February 17, 1938, American Toll Brid Company filed with the Railroad Commission its Pe

tion for Rehearing, as provided in Section 67 of the Public Utilities Act, St. 1915, ch. 91, p. 115, 161 (R. 40).

On February 21, 1938, the Railroad Commission made and filed its order denying said Petition for Rehearing, without referring to any point raised in said Petition (R. 79).

6. PROCEEDINGS BEFORE THE SUPREME COURT OF CALIFORNIA.

On April 6, 1938, on petition of appellant, Writ of Review issued out of the Supreme Court of California (R. 115).

After the filing of briefs and oral argument, said Court, on September 27, 1938, rendered a "By the Court" decision (96 Cal. Dec. 367; R. 122).

On October 17, 1938, appellant filed its Petition for Rehearing, as provided by the Rules of said Court (R. 141).

On October 27, 1938, said Court made and filed its order denying said Petition, without opinion (R. 196).

7. PROCEEDINGS BEFORE THE SUPREME COURT OF THE UNITED STATES.

On October 28, 1938, Order Allowing Appeal and granting supersedeas was signed by the Chief Justice of the Supreme Court of California and filed (R. 202).

Thereafter, on November 12, 1938, appellees filed in the office of the Clerk of the Supreme Court of California their Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, which Statement has

been separately printed. Appellant thereafter filed in this Court its Brief in Opposition to said Statement and Motion.

On March 13, 1939, this Court made and entered its order noting probable jurisdiction and denying said Motion to Dismiss or Affirm.

The record herein consists of printed Transcript of Record plus a number of "Original Exhibits" which on order of the Chief Justice of the Supreme Court of California, have been certified separately and forwarded to the clerk of this Court (R. 20).

Said "Original Exhibits" consist of a large numbe of photographs showing the progress of the construc tion work on the Carquinez Bridge from the begin ning to the end and also all of appellant's importan engineering and financial exhibits. Portions of sai exhibits have also been incorporated in the printe Transcript of Record.

Unless otherwise specified, italics herein are ours.

ASSIGNED ERRORS.

Appellant intends to urge each of the assign errors heretofore filed in the office of the Clerk of t Supreme Court of California and printed in the Tra script of Record herein (R. 199-201).

Said assigned errors are as follows:

1. The Supreme Court of the State of Califor erred in holding and deciding that the Railroad Co mission's order establishing the tolls to be charged a

collected by appellant for pedestrians and automobiles using appellant's Carquinez Bridge over the Straits of Carquinez between the Counties of Contra Costa and Solano, State of California, did not impair the obligation of the contract evidenced by Ordinance No. 171 of the Board of Supervisors of said Contra Costa County, including the provisions of existing statutes which were read into and became a part of said contract, and the acceptance of the provisions of said Ordinance by appellant's assignor, within the meaning of Section 10 of Article I of the Constitution of the United States.

2. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not confiscate appellant's property in said Carquinez Bridge and did not constitute a deprivation of said property without due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

3. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not fail to recognize and to give effect to the rights of appellant in a wasting asset, namely, the Carquinez Bridge, the title to which will revert to the Counties of Contra Costa and Solano on the expiration in 1948 of the franchise granted by said Ordinance No. 171 for the construction and operation of the Carquinez Bridge, and in holding and deciding that the Railroad Commission's order did not

confiscate appellant's property in said Carquinez Bridge and did not constitute a deprivation of said property, without due process of law, and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

4. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order did not confiscate appellant's property in both the Carquinez and the Antioch Bridges and did not constitute a deprivation of said property without due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

5. The Supreme Court of the State of California erred in holding and deciding that the procedure before the Railroad Commission was not unfair, unjust and arbitrary and did not constitute a denial to appellant of due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

6. The Supreme Court of the State of California erred in failing to hold that, even though the language of Sections 2845 and 2846 of the Political Code of the State of California be regarded as the language of regulation and not the language of contract, the Legislature of 1937, in declaring toll bridges to be public utilities, did not amend or repeal said Sections of the Political Code or any part thereof and that it was the

duty of the Railroad Commission, stepping into the shoes of the Board of Supervisors of said Contra Costa County, to follow, in fixing appellant's said tolls, the rate making standard fixed and prescribed by the Legislature with reference to toll bridges, in said Sections 2845 and 2846 of the Political Code, and said Supreme Court of the State of California further erred in failing to hold that the Railroad Commission's failure to follow the standard of reasonableness of rate making for toll bridges theretofore established by the Legislature constituted a denial to appellant of due process of law and a denial of the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

7. The Supreme Court of the State of California erred in holding and deciding that the Railroad Commission's order, severing the Antioch Bridge from appellant's single, unified transportation system, and fixing tolls for the Carquinez Bridge alone, notwithstanding the fact that the record shows without dispute that the inevitable effect of the reduction of tolls on the Carquinez Bridge would, by the force of competition between the two bridges, compel appellant to make a similar reduction in the tolls charged on the Antioch Bridge, was not unfair, unjust and arbitrary action and did not deny to appellant due process of law and did not deny to appellant the equal protection of the laws, within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

8. The Supreme Court of the State of California erred in holding and deciding that the procedure before the Railroad Commission, particularly the institution of the case by the Railroad Commission on its own motion by a mere order or notice of inquiry without the filing of a complaint or the making of any charges, and the conduct of the inquiry thereafter without the formulation of any issues by the filing of answer or in any other way, and the Railroad Commission's failure to advise appellant at any time or in any way, prior to the decision, of the Government's proposals, did not deny to appellant due process of law and did not deny to it the equal protection of the laws within the meaning of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

SUMMARY OF ARGUMENT.

A very brief and concise summary of the argument herein is as follows:

I. The Railroad Commission's order impaired th obligation of the contract between appellant and th State of California, evidenced by (a) Ordinanc No. 171 of the Board of Supervisors of Contra Cost County, California, including the provisions of exis ing statutes which were read into and became a pa of said contract, and (b) the acceptance of the prov sions of said Ordinance by appellant's assignor.

II. The procedure of the Railroad Commissi constituted a denial of procedural due process of la for each of the following reasons:

A. Said procedure constituted a denial of due process of law under the principles most recently stated by this Court in *Morgan v. United States,* 304 U. S. 1;

B. Said procedure constituted a denial of due process of law because the Railroad Commission failed to make findings as to fair value or a proper rate base and to make any of the other necessary basic and essential findings;

C. Said procedure constituted a denial of due process of law because the Railroad Commission failed to follow the rate-making rule or standard prescribed by the Legislature of California for application to toll-bridge companies; and

D. Said procedure constituted a denial of due process of law because the Railroad Commission unfairly, unjustly and arbitrarily severed the Antioch Bridge from appellant's single, unified transportation system and fixed tolls for the Carquinez Bridge alone, notwithstanding the fact that the record shows, without dispute, that the inevitable effect of the reduction of tolls on the Carquinez Bridge would, by force of competition between the two bridges, compel appellant to make similar reductions in the tolls charged by the Antioch Bridge, a losing venture, thus accomplishing by indirection a result which the Railroad Commission could not accomplish directly.

III. Entirely independent of and in addition to the point as to the impairment of contract obliga-

tions, the Railroad Commission's order, tested by the principles usually applicable to public utility and common carrier rate cases, confiscated the property of American Toll Bridge Company in each of the following respects:

A. The Railroad Commission's order confiscated appellant's property in the Carquinez Bridge because it failed to accord a fair return on fair value;

B. The Railroad Commission's order confiscated appellant's property in both the Carquinez and the Antioch Bridges because it failed to accord a fair return on fair value; and

C. The Railroad Commission's order confiscated appellant's property in both bridges for the further reason that it failed to recognize and give effect to the rights of appellant in its wasting assets, namely, the Carquinez and Antioch Bridges, the title to both of which bridges will pass to the adjacent counties on the expiration in 1948 of the franchises granted by said counties for the construction and operation of said two bridges.

Argument.

We shall now develop, in appropriate detail, our argument with reference to each of said points.

I.

IMPAIRMENT OF CONTRACT OBLIGATIONS.

The order of the Railroad Commission of California establishing the tolls to be charged and collected by appellant for pedestrians and automobiles using appellant's Carquinez toll bridge over the Straits of Carquinez between the Counties of Contra Costa and Solano, State of California, impaired the obligation of the contract evidenced by Ordinance No. 171 of the Board of Supervisors of said Contra Costa County, including the provisions of existing statutes which were read into and became a part of said contract, and the acceptance of the provisions of said ordinance by appellant's assignor, within the meaning of Section 10 of Article I of the Constitution of the United States.

1. **Where the question at issue is the alleged impairment of the obligations of a contract, this Court, while giving due consideration and weight to the views of the State's highest court, will make an independent examination and will decide for itself (a) whether a contract was made, (b) what are its terms and conditions and (c) whether the State has, by subsequent legislation, impaired the obligations of the contract.**

Some of this Court's most recent decisions to this effect are as follows:

New York Rapid Transit Corporation v. City of New York, 303 U. S. 573, 593;

Indiana v. Brand, 303 U. S. 95, 100;

United States Mortgage Co. v. Matthews, 293 U. S. 232, 236;

Coombes v. Getz, 285 U. S. 434, 441;

Larson v. South Dakota, 278 U. S. 429, 433;

Appleby v. City of New York, 271 U. S. 364, 379-80;

Detroit United Railway v. Michigan, 242 U. S. 238, 249, 251.

The Court will not hesitate, where it appears to be necessary to reach a conclusion differing from that of the State Court, to reverse the decision of the State Court as to whether a contract exists, as to what are its terms and conditions, or as to whether the obligations of the contract are impaired by subsequent State legislation. Such reversals are found in the following cases, among others:

Indiana v. Brand, 303 U. S. 95;

United States Mortgage Co. v. Matthews, 293 U. S. 232;

Coombes v. Getz, 285 U. S. 434;

Appleby v. City of New York, 271 U. S. 364;

Geargia Railway & Power Company v. Town of Decatur, 262 U. S. 432;

Detroit United Railway v. Michigan, 242 U. S. 238;

Terre Haute and Indianapolis Railroad Company v. Indiana, 194 U. S. 579;

Houston and Texas Central Railroad Company v. Texas, 177 U. S. 66;

Mobile and Ohio Railroad Company v. Tennessee, 153 U. S. 486;
Jefferson Branch Bank v. Skelly, 1 Black (66 U. S.) 436.

The independent examination to be made by this Court is just as applicable where part or all of the contract consists of a State *statute* which was construed by the State court as is the case where no statute is involved.

Indiana v. Brand, 303 U. S. 95, 100;
Coombes v. Getz, 285 U. S. 434, 441;
Freeport Water Company v. Freeport City, 180 U. S. 587, 595, 610;
Walsh v. Columbus, Hocking Valley and Athens Railroad Company, 176 U. S. 469, 475;
Jefferson Branch Bank v. Skelly, 1 Black (66 U. S.) 436, 443.

2. The contract in the present case is evidenced by Ordinance No. 171 of the Board of Supervisors of Contra Costa County, California, which Ordinance granted the right to construct and operate the Carquinez Toll Bridge, and the acceptance thereof by the grantee.

Copy of said Ordinance No. 171 is printed as Appendix No. 1 attached to this Brief. See also R. 269-277.

Said Ordinance was adopted and accepted under and in accordance with the provisions of Article I (entitled "General Provisions") and Article II (entitled "Toll Bridges") of Chapter IV (entitled

"Public Ferries and Toll-bridges") of Title VI (entitled "Public Ways") of Part III (entitled "Of the Government of the State") of the Political Code of the State of California.

The Political Code was approved on March 12, 1872.

Ordinance No. 171 was adopted by the Board of Supervisors of Contra Costa County, California, on February 5, 1923, and became effective thirty days from and after its passage (Appendix No. 1 to this Brief).

The Ordinance granted to appellant's assignor the right to construct the Carquinez Bridge and to operate it "for the term of twenty-five (25) years from and after the effective date of the ordinance".

Continuing, the Ordinance provided:

> "It is hereby ordered that at the expiration of term hereby granted the title to said toll bridge shall revert to the Counties of Contra Costa and Solano."

The proffered franchise was duly accepted by the grantee.

Additional terms and conditions of the Ordinance will be referred to under the next subhead of this Brief.

3. The terms and conditions of the contract appear in said Ordinance No. 171 and in certain provisions of the Political Code of California which were read into and became a part of the contract.

That the provisions of the law under which the franchise was granted entered into and became a part of the contract follows necessarily from the authorities and will, we believe, be conceded.

Kennedy v. City of Gustine, 210 Cal. 18, 21;
Flagg v. Sloane, 135 Cal. App. 334, 336;
Frank v. Crescent Wharf & Warehouse Company, 50 Cal. App. 272, 275;
City of Cincinnati v. Public Utilities Commission of Ohio, 98 Ohio St. 320, 3 A. L. R. 705, 708;
6 *Cal. Jur.* 310, sec. 186.

We also assume that it will be conceded that "a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Article I, Section 10" of the Constitution of the United States.

Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 100.

As this Court, speaking through Mr. Justice Cardozo, also said in *Worthen Co. v. Kavanaugh*, 295 U. S. 56, 60:

"To know the obligation of a contract we look to the laws in force at its making."

Among the provisions of law which became a part of the contract in the present case were Sections 2845 and 2846 of the Political Code of California.

The relevant portions of said Section 2845, as the same read at the time when said Ordinance No. 171 was adopted, were as follows:

> "The board of supervisors granting authority to construct a toll-bridge or to keep a public ferry, must at the same time:
>
> "2. Fix the amount of license tax to be paid by the person or corporation for taking tolls thereon, not less than three dollars nor over one hundred dollars per month, payable annually.
>
> "3. Fix the rate of tolls which may be collected for crossing the bridge or ferry, which must not raise annually an income exceeding fifteen per cent on the actual cost of the construction or erection and maintenance of the bridge or ferry for the first year, nor on the fair cash value together with the repairs and maintenance thereof for any succeeding year; * * *"

Section 2846 has at all times, from and after its enactment in 1872, read as follows:

> "The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the

bridge or ferry. The license tax fixed by the board of supervisors must not exceed ten per cent of the tolls annually collected."

Said sections will hereinafter in this Brief by analyzed in detail. For the present, it will suffice to say that said Ordinance No. 171 complied with said provisions of the Political Code.

After setting forth the prerequisite findings, said Ordinance No. 171 grants to Rodeo-Vallejo Ferry Company, appellant's assignor, the right and franchise to erect, construct and maintain the Carquinez Toll Bridge for the term of twenty-five (25) years from and after the effective date of the Ordinance.

After providing that, at the expiration of said term of twenty-five (25) years, the title to the Toll Bridge shall pass to the Counties of Contra Costa and Solano, the Ordinance specified the type of construction, the location of the terminals in both Contra Costa and Solano Counties and the location of the bridge axis or center line.

The Ordinance provided that the grantee should pay a license tax of $100.00 per month and provided, also, that the grantee should pay the additional sum of two per cent of the gross revenue for the benefit of the Counties of Contra Costa and Solano. This latter provision was the subject of the action in *County of Contra Costa v. American Toll Bridge Company*, 10 Cal. (2d) 359, to which case further reference will hereinafter be made.

The Ordinance specified the time for the beginning of the construction of the bridge and also for its completion.

As required by said Section 2845 of the Political Code, the Ordinance next set forth, in considerable detail, the rates of toll to be charged for the different types of user of the bridge.

The Ordinance also provided that the bridge should be constructed in accordance with the requirements of the United States War Department.

In connection with the rate of tolls, the Ordinance provided that the same should be fixed by the Railroad Commission but that in the event that the Railroad Commission failed to do so, the tolls to be collected should be those set forth in detail in the Ordinance. The Railroad Commission did not fix the tolls. The provision for such action by the Railroad Commission was obviously void for the reason that the Board of Supervisors and the grantee of the franchise could not, by any agreement between themselves, confer upon the Railroad Commission a jurisdiction which it did not have. The Legislature had (a) conferred that jurisdiction upon the Board of Supervisors and (b) failed to confer it upon the Railroad Commission. For both of these reasons, said franchise provision was void.

The Railroad Commission concedes (R. 32) that it had no jurisdiction or authority over American Toll Bridge Company or over the Carquinez Bridge prior to the effective date of the Act of July 1, 1937.

The franchise for the construction and operation of appellant's Antioch Bridge was granted by Ordinance No. 175 of the Board of Supervisors of Contra Costa County on June 4, 1923 (Exh. 1, R. 209, 226). In all material respects, including the provisions for a term of only twenty-five years and for the passage of the title of the bridge to the adjacent counties at the end of said time, the provisions of Ordinance No. 175 are substantially similar to those of Ordinance No. 171 (Exh. 1, R. 209, 226-7).

4. That the Carquinez Bridge franchise ordinance and its acceptance constitute a contract binding, in California, on both parties, appears from the decisions of this Court and of the Supreme Court of California.

It is well settled in California that a franchise authorizing a common carrier or other public utility to construct its plant, lines, structures or works creates, when accepted and acted upon, a vested right by contract which cannot be impaired by subsequent legislation.

In *Postal Telegraph-Cable Company v. Railroad Commission of California*, 200 Cal. 463, the Supreme Court of California, among other matters, gave consideration to the effect of the construction by telegraph or telephone corporations of their lines under permission granted by Section 536 of the Civil Code of California. Referring to said section, the court, in a decision by Chief Justice Waste, said (p. 472):

"This section constitutes a grant of a franchise which the state offered, and petitioner accepted

by the construction of its lines. The rights acquired by the Telegraph Company, by accepting and availing itself of the provisions of the section, are vested rights which the constitutions, both state and federal, protect. They cannot be taken away by the state, even though the legislature should repeal the section, or by the people through a constitutional provision. (*Western Union Tel. Co. v. Hopkins,* 160 Cal. 106, 119 et seq.; *Postal Telegraph-Cable Co. v. Los Angeles,* 160 Cal. 129, 131; *In re Keppelmann,* 166 Cal. 770, 773.)"

Again, at page 473:

"The grant, resulting from the acceptance of the state offer (in said section 536, C. C.) constituted a *contract* between the Telegraph Company and the state, secured by the constitution of the United States against impairment by any state legislation (*Western Union Tel. Co. v. Hopkins,* supra, p. 120; *Sunset Tel. & Tel. Co. v. Pomona,* 172 Fed. 829, 837; *Russell v. Sebastian,* 233 U. S. 195, 204-208; *State ex rel. Shaver v. Iowa Telephone Co.,* 175 Iowa 607, 616, Ann. Cas. 1917E 539, 154 N. W. 678)."

In *Western Union Telegraph Company v. Hopkins,* 160 Cal. 106, the Supreme Court of California, in a decision by Mr. Justice Angellotti, said (p. 119):

"Assuming that section 536 of the Civil Code was a grant of the right to such use of the streets, we are of the opinion that it must be held, to use the language of the United States circuit court of appeals in *Sunset Tel. & Tel. Co. v. Pomona,*

172 Fed. 837, that the maintenance and operation of such system 'was an acceptance by it of the provisions of that statute, which thereby became a *contract* between the company and the state, secured by the constitution of the United States against impairment by any subsequent state legislation.' "

In *Russell v. Sebastian,* 233 U. S. 195, this Court ecided a case involving the rights conferred upon e suppliers of artificial light and other specified iblic utility services in California cities by Secon 19 of Article XI of the Constitution of Calirnia. On this subject, the Court said (p. 204):

"That the grant, resulting from an acceptance of the State's offer, constituted a *contract,* and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court. *New Orleans Gas Co. v. Louisiana Light Co.,* 115 U. S. 650, 660; *New Orleans Water Works Co. v. Rivers,* 115 U. S. 674, 680, 681; *Walla Walla v. Walla Walla Co.,* 172 U. S. 1, 9; *Louisville v. Cumberland Telephone Co.,* 224 U. S. 649, 663, 664; *Grand Trunk Rwy. Co. v. South Bend,* 227 U. S. 544, 552; *Owensboro v. Cumberland Telephone Co.,* 230 U. S. 58, 65; *Boise Water Co. v. Boise City,* 230 U. S. 84, 90, 91; *Dillon on Municipal Corporations,* 5th ed., sec. 1242."

We believe that the citation of further cases to the ne effect is unnecessary.

5. **The Legislature of California expressly ratified Ordinance No. 171**

By Act of May 8, 1923 (St. 1923, ch. 131, p. 272), enacted about two months subsequent to the effective date of Ordinance No. 171, the Legislature of California amended Section 2872 of the Political Code, on the subject of toll bridges, by adding thereto the following sentence:

> "All licenses and franchises granted subsequent to the fourteenth day of March, A. D. one thousand eight hundred and eighty-one for the construction of any such bridges across the Sacramento or San Joaquin Rivers, the Suisun Bay; *or Carquinez Straits*, the Petaluma, Napa or Sonoma Creeks, whether above or below the head of navigation of said waters or streams, are hereby ratified, approved, confirmed and made valid for all purposes; provided, however, that nothing herein contained shall be construed to extend the term of any such license or franchise beyond the period fixed in the order granting the same, or to revive any license or franchise which has lapsed for non-user, or to restore any license or franchise which has been forfeited."

By this Act, the Legislature expressly ratified said Ordinance No. 171.

6. **The Supreme Court of California heretofore decided that this very Ordinance No. 171 and its acceptance constituted a binding contract.**

In *County of Contra Costa v. American Toll Bridge Company*, 10 Cal. (2d) 359, decided as recently as December 11, 1937, the Supreme Court of California gave consideration to the very ordinance here at issue.

namely, Ordinance No. 171 of the Board of Supervisors of Contra Costa County.

The question there was whether appellant was bound by the provision of said Ordinance No. 171 reading as follows:

> "That two (2%) per cent of the gross receipts derived from the use and operation of said bridge shall also and in addition be paid to the County of Contra Costa for the benefit of the counties of Contra Costa and Solano for the use of said franchise."

In deciding that American Toll Bridge Company was bound by said provision, the court held that the language of said Ordinance No. 171 is the language of "agreement" and that the Company was bound by its "contract". At page 361, the court referred to the Company's "definite *agreement* to meet this charge". At page 363, the court continued the same thought, as follows:

> "And when so required this condition becomes a part of the *contract* which the grantee has voluntarily assumed."

At page 364, the court referred to code sections which authorized the board of supervisors to *agree* with the grantee of the franchise on compensation to be paid by the latter. On this point, the court said:

> "In addition to the efficacy of the code sections in authorizing the board of supervisors to impose the condition of additional compensation, or, *as in this case*, to *agree with the grantee* that such additional compensation be paid, we take notice of an

amendment to section 2872 of the Political Code in 1923, approved May 8th of that year."

Again, at page 366, the court said:

"Having obtained the advantages that have flowed from the grant, the holder may not now ~~with good grace~~, it at all, effectively resist the performance of an obligation thereunder which it voluntarily and lawfully *agreed* to undertake."

Justice Edmonds, in his concurring opinion, expressed the same view (p. 367):

"It is a *contract* between the corporation and the county."

The court thus found that said Ordinance No. 171 constituted a *contract* between this appellant and the County of Contra Costa and that this appellant was bound by the *burdens* of that contract.

We submit, very respectfully, that it would be neither lawful nor just to hold appellant to be bound by the *burdens* of its contract and yet to deny to appellant the *benefits* of the same contract.

7. By virtue of the terms and conditions of said contract, appellant has a contract right that its bridge tolls shall not be reduced by the public authorities unless it shall first appear that said tolls are yielding a return in excess of 15 per cent on the rate base specified by Sections 2845 and 2846 of the Political Code of California.

a. The Legislative history of toll bridge construction and operation in California shows the evolution of the contract rights granted to the constructors and operators of toll bridges.

Prior to the enactment of the Political Code in 1872, there were three distinct stages in the legislative

history of toll bridge construction and operation in California.

The *first stage* commenced with the year 1850 and continued to the year 1857. During this stage, the toll bridge franchises granted by or under authority of the Legislature merely provided that the toll bridge owners should be permitted to charge such tolls as the courts of sessions and, later, the boards of supervisors, should fix annually.

For the general laws enacted on this subject during this period see St. 1850, p. 347; St. 1851, p. 368; St. 1854, p. 123; St. 1855, p. 183.

The *second stage* in the evolution of the laws dealing with toll bridge construction and operation consisted of a series of Special Acts enacted in 1857 and a number of subsequent years, principally in 1861-4. Without burdening this Brief by reference to each of these Special Acts, we believe that it will suffice to say that there were 22 such statutes. Typical of all the others is the first one, namely, the Act of April 3, 1857, granting the right to construct a toll bridge across the Sacramento River (St. 1857, ch. 150, p. 175).

These Acts all specified that the operators could charge "such rates of toll as the board of supervisors may fix annually; provided, that the Legislature may, at all times, modify or change the rates so fixed".

It will be observed that under both types of Acts thus far noted the matter of rate regulation was in the hands, first, of the courts of sessions and, later, of the boards of supervisors, *unrestricted by any ex-*

pressed limitation as to the rate of return. The grantees of the toll bridge franchises had no contract protection against action by the boards of supervisors reducing their tolls.

Because of this situation, there occurred the *third stage* in the evolution of the legislation dealing with toll bridge construction and operation. General laws and Special Acts of a third type were enacted by the Legislature beginning with the year 1862 and extending up to the adoption of the new Codes in the year 1872. These General Statutes and Special Acts provided, substantially, that the operators of the toll bridges could charge such rates as the boards of supervisors should annually prescribe *but there followed a provision of the general tenor that the board of supervisors should not fix the rates of toll so low as to make the net income less than a specified percentage per annum upon the cost or the fair value or some similar specified base figure of the toll bridge property.*

At this point, the Legislature clearly entered into the realm of *contract* and provided that the toll bridge operators thereafter receiving franchises should be protected by contract provisions against reduction of tolls so as to yield less than a specified rate of return. Before that time, the grantees of toll bridge franchises were entirely at the mercy of the boards of supervisors, who had authority to reduce tolls without expressed limitation. Hereafter, the construction of toll bridges was to be encouraged by giving to the toll bridge operators *contract protection* as specified in said General Statutes and Special Acts beginning with the year 1862.

The first statute of this kind was the Special Act of March 21, 1862 (St. 1862, ch. 74, p. 62) granting a franchise for a toll bridge across the Pajaro River at The Malposo. Section 3 of said Act provides:

> "The said company, upon the erection and completion of said bridge, shall be authorized and empowered to charge and collect such rates of toll as the Board of Supervisors of Monterey County may fix annually; *provided, that the rates of toll shall not be placed at less than sufficient to yield 20 per cent per annum upon the value of such bridge.*"

On April 15, 1862, the Legislature enacted a general law supplemental to the Act of April 18, 1855 (St. 1862, ch. 229, p. 247), concerning public ferries and toll bridges. This Act authorized boards of supervisors to grant licenses to construct toll bridges across non-navigable streams in their respective counties. Section 1 of the Act authorized the boards to prescribe the rates of toll and to change the same from year to year, as in their discretion might seem proper. Then came the following language:

> *"but shall not fix them so low as to make the net income less than 15 per cent per annum upon a fair valuation of such bridge."*

This was a general law applicable to all toll bridge franchises thereafter to be granted by any board of supervisors, as distinguished from Special Acts of the Legislature. The enactment of this general statute works a distinct change of policy on the part of the Legislature. Theretofore the boards of supervisors, grant-

ing toll bridge franchises, had authority to fix the tolls in their discretion; *but beginning with 1862 all general statutes on the subject have contained a provision that the boards of supervisors should have no authority to fix the tolls so as to yield a return less than that definitely specified in the statute.*

The Special Act of March 6, 1863 (St. 1863, ch. 41, p. 40) granted a franchise for a toll bridge across the Cosumnes River near Dutch Hill. Section 2 reads as follows:

> "And the said parties to whom this franchise is granted, after the completion of the bridge, are authorized to charge and collect such rates of toll as the Board of Supervisors of the County of Amador shall fix; *provided, that the rates of toll shall not be placed at less than sufficient to yield 10 per cent per annum upon the value of the bridge, cost of keeping the same in repair, and expenses of collecting toll* * * * ."

The Special Act of April 6, 1863 (St. 1863, ch. 151, p. 183) granted a franchise for a toll bridge across the Yuba River. Section 5 reads, in part, as follows:

> "Upon the erection and completion of said bridge, said company shall be and are hereby authorized and empowered to charge and collect such rates of toll as the Board of Supervisors for the County of Yuba may annually fix; *provided, such rates of toll shall not be fixed so as to yield an annual income of less than 15 per cent on the cost of constructing said bridge* * * *."

The Special Act of April 25, 1863 (St. 1863, ch. 323, p. 485) granted a franchise for a toll bridge across

the Mokelumne River near Lancha Plana. Section 2 reads:

> "The said parties to whom this franchise is granted, after the completion of said bridge, are hereby authorized to charge and collect such rates of toll as the Board of Supervisors of Calaveras County shall annually fix; *provided, that the rates of toll shall not be placed so low as to yield less than* 15 *per cent per annum upon the value of said bridge, cost of keeping the same in repair, and expenses of collecting toll* * * *."

On April 27, 1863, the Legislature enacted another general statute authorizing the boards of supervisors of the various counties to grant licenses to construct toll bridges across non-navigable streams in their respective counties for periods not exceeding twenty years (St. 1863, ch. 444, p. 720). On the subject of the tolls, Section 1 provides as follows:

> "and said Board shall have power to prescribe the rates of toll, and change the same from year to year, as in their discretion may seem proper; *but previous to the first day of January, Eighteen Hundred and Seventy-three, they shall not fix said rates so low as to make the net income less than twenty per cent per annum upon a fair valuation of such bridge or ferry and franchise; and, thereafter, not less than ten per cent per annum upon such valuation, which shall be made at the time in each year when the tolls are fixed.*"

On the same day, namely, April 27, 1863, the Legislature enacted another general statute amending Section 19 of the Act of April 28, 1855, so as to provide

that the board of supervisors, in establishing rates of toll to be charged by toll bridges, should not fix tolls at a rate so low as to make the income to the owners thereof less than 24 per cent per annum on the *assessed* taxable value of such ferry or toll bridge (St. 1863, ch. 504, p. 758).

On the same day, namely, April 27, 1863 (St. 1863, ch. 457, p. 734), there was approved a Special Act granting a franchise for a toll bridge across the Cosumnes River, near Michigan Bar. Section 2 reads, in part:

> "The parties holding the franchise granted under this Act may collect such tolls as the Supervisors of the County of Sacramento may or shall annually fix and determine; *provided, however, the rate of tolls fixed shall not be so low as to prevent the owners of the franchise receiving* 18 *per cent per annum on the money actually invested* * * *."

The next Special Act was approved on April 2, 1866 (St. 1865-6, ch. 532, p. 692). This Act granted a franchise for a toll bridge across the Feather River at Oroville. Section 4 reads:

> "Upon the completion of said bridge said company may charge and collect such rates of toll as may be annually determined by the Board of Supervisors of the County of Butte under the laws of the State; *but such tolls shall not be fixed at rates that will not yield* 20 *per cent on the actual costs of the construction of said bridge and the lands and appurtenances appertaining thereto* * * *."

The last Special Act prior to 1872 was the Act of February 24, 1870 (St. 1869-70, Suppl., p. 18) which granted a franchise for a toll bridge *and ferry* across the Russian River near its mouth. The statute also made provision for the opening of a public highway and for the condemnation of lands, if necessary. Section 8 authorized the grantees to collect from persons using the bridge and ferry such rate of tolls as might be established by the Board of Supervisors of Sonoma County "*which said rates shall raise a sufficient amount annually to pay* 10 *per cent per annum on the cost of constructing the said bridge and ferry, over and above necessary repairs and expenses of running the ferry* * * *."

The last legislative enactment in the series prior to 1872, was the General Statute of April 4, 1870 (St. 1869-70, ch. 581, p. 887). This statute authorized the boards of supervisors in the various counties to grant licenses for the construction of toll bridges across streams in their counties for periods not to exceed twenty years and also to grant licenses to maintain public ferries. Section 1 then proceeds as follows:

> " * * * and said Board shall have the right to prescribe the rates of toll, and change the same from year to year, as they may think proper, but previous to the first day of January, 1873, they shall not fix the rates of toll over any bridge or ferry constructed or licensed under the provisions of this Act so low as to make the net (income) less than twenty per cent per annum upon a fair valuation of such bridge or ferry and franchise,

and thereafter, not less than ten per cent per annum upon such valuation, which shall be made at the time in each year when such tolls are fixed * * * "

Thus, when the Political Code was enacted in 1872, the Legislature had had a long and interesting experience in connection with the granting of toll bridge franchises authorized either by General Statutes or by Special Acts. Beginning with the regulation of tolls by the courts of sessions and then by the boards of supervisors, without any limitation on their authority in the fixing of tolls, there gradually developed, beginning with the year 1862, a plan of regulation more calculated to induce private capital to go into the business of constructing and operating toll bridges. This was a plan by which the grantees of the toll bridge franchises secured *contract rights* under which they were entitled to have the tolls not fixed so low as to make the net income less than a specified percentage per annum upon a specified base, whether the original cost or a subsequent valuation.

Gradually, the original types of franchises fell into disuse and the third type was adopted, either by general statutes applicable to all the boards of supervisors, or by Special Acts enacted by the Legislature itself. As has been noted, the last legislative Act prior to 1872 was the statute of April 4, 1870, providing that boards of supervisors granting toll bridge franchises, while having the right to prescribe the tolls each year, were subject to the definite limitation that they could not fix the rates of toll so low as to make

the net income less than 20 per cent per annum prior to January 1, 1873, and 10 per cent per annum thereafter.

That was the most recent expression of the Legislature when the Political Code was enacted in 1872. What the Legislature did, in enacting Sections 2845 and 2846 of the Political Code, was to continue in effect the policy which had theretofore been evolved as the result of twenty years of experience in the granting of toll bridge franchises and to provide that although the boards of supervisors could pass upon the tolls each year, they should be subject to the very definite limitation—a *contract right* in the grantees—that they could not reduce the rates so low as to yield less than a specified rate of return. The rate of return, fixed in 1872 at 15 per cent, was a general average of the returns fixed during the preceding years and a definite average of the two figures of 20 per cent and 10 per cent specified in the last preceding statute on the subject.

Sections 2845 and 2846 of the Political Code are merely a recognition of the evolution of toll bridge franchise regulation from the earlier unlimited right of the boards of supervisors to fix such tolls as they might please to the later limitation of such right by appropriate *contract* protection accorded to the grantees of the franchises.

b. An analysis of the language of the contract shows the rights claimed by appellant.

In the light of the historical background of legislative experience and evolution, we turn now to the

specific language of said Sections 2845 and 2846 of the Political Code.

In view of the importance of this language, and in order to facilitate its analysis, we restate the same.

On February 5, 1923, the relevant portions of Section 2845 of the Political Code were as follows:

> "The board of supervisors granting authority to construct a toll-bridge or to keep a public ferry, must at the same time:
>
> "2. Fix the amount of license tax to be paid by the person or corporation for taking tolls thereon, not less than three dollars nor over one hundred dollars per month, payable annually.
>
> "3. Fix the rate of tolls which may be collected for crossing the bridge or ferry, which must not raise annually an income exceeding fifteen per cent on the actual cost of the construction or erection and maintenance of the bridge or ferry for the first year, nor on the fair cash value together with the repairs and maintenance thereof for any succeeding year; * * *"

Section 2846 of the Political Code has at all times in and after 1872, read as follows:

> "The license tax and rate of toll fixed as provided in the preceding section must not be increased or diminished during the term of twenty years, at any time, unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is disproportionate to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the

bridge or ferry. The license tax fixed by the board of supervisors must not exceed ten per cent of the tolls annually collected."

That said two sections must be read together is clear. In fact, the first sentence of Section 2846 says "as provided in the preceding section" and thus expressly ties the two sections together.

Section 2845 deals first with the *first year*. It provides that the Board of Supervisors granting authority to construct a toll-bridge must *"at the same time"* do two things:

1. Fix the amount of the *license tax;* and

2. Fix the rate of *tolls.*

The license tax is to be not less than $3.00 nor over $100.00 per month, payable annually.

The rate of tolls is to be so fixed that it shall not raise *for the first year* an income exceeding 15 per cent on the actual cost of the construction or erection, together with the maintenance of the bridge.

In both respects, the Board of Supervisors of Contra Costa County, in enacting said Ordinance No. 171, followed the provisions of said Section 2845. At the same time, and in the very ordinance itself, the Board inserted provisions as to both the license tax and the rate of tolls.

In one respect, said Section 2845 also contains provisions with reference to the years *following the first year*. The Section provides, in Paragraph 3, that the rates of toll shall be so fixed that "for any succeeding

year" after the "first year" they shall yield not to exceed 15 per cent "on the fair cash value" of the bridge, together with the repairs and maintenance thereof. For the first year, it will be remembered, the 15 per cent was to be "on the actual cost of the construction or erection" whereas in succeeding years the 15 per cent is to be "on the fair cash value" of the bridge.

This distinction is quite logical. During the first year after the completion of the toll bridge, the amount of money expended in the construction or erection of the bridge is still readily obtainable and it may be assumed that such amount will represent the fair value of the bridge at that time. In subsequent years, other elements, such as amounts to be set aside for depreciation and amortization and changing levels of the cost of wages and materials, enter into the problem, so that for those years the rate base is to be the "fair cash value."

Turning now to Section 2846, this Section deals with the remaining nineteen years of the first *twenty* years of the life of the bridge. This Section provides that in those years the "license tax" shall not be "increased" and the "rate of toll" shall not be "diminished"

> "unless it is shown to the satisfaction of the board of supervisors that the receipts from tolls in any year is *disproportionate* to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry."

As to the meaning of the word "disproportionate" we need only turn to Section 2845, in which the Legislature itself laid down the *standard* or *rule* to be applied in determining whether or not the receipts from tolls in any one year have become "disproportionate."

Construing Sections 2845 and 2846 together, it is clear that what the Legislature had in mind was that tolls which yield up to 15 per cent on the cost of construction or erection, or the fair cash value thereof, together with the necessary repairs and maintenance, are not to be regarded as "disproportionate" but that if and when the yield becomes more than 15 per cent it will be deemed to be "disproportionate." In the latter event, even though this situation should develop within less than twenty years after the effective date of the franchise, the board of supervisors would have the right, under the contract, to reduce the tolls in the manner specified in the appropriate sections of the Political Code.

This does not mean that American Toll Bridge Company is at this time necessarily entitled to a 15 per cent return. The record shows, and it is conceded, that the Company has never earned anywhere near a 15 per cent return (96 Cal. Dec. 367, 373; R. 128). Also, under its contract the Company has no right to *increase* its tolls so as to secure a yield of 15 per cent.

The statement in the opinion of the Supreme Court of California that it is appellant's position that the provisions of said Sections 2845 and 2846 of the Po-

litical Code "amount to an irrevocable contract for a *minimum annual percentage of return* to the petitioner" (96 Cal. Dec. 367, 374; R. 130) is entirely without justification. Appellant has never made such claim.

The Company's contract right is that the tolls specified by the Board of Supervisors of Contra Costa County, either originally or by subsequent action of the board taken under and in accordance with the provisions of said Sections 2845 and 2846 of the Political Code, shall not be *diminished* by any public authority unless it should appear that the yield from the tolls then in effect has become in excess of 15 per cent. If the yield is less than 15 per cent, appellant must be content with such lesser yield; but the public authorities may not *reduce* the rates which yield such lesser return.

The Railroad Commission has itself conceded that appellant's construction of the meaning of the words of said Sections 2845 and 2846 is correct. While differing from appellant as to the legal effect of the language, the Commission's counsel have agreed with appellant as to the *meaning of the language* of said Sections 2845 and 2846. Counsel for the Commission have taken the following position (R. 150-1):

> "It may be conceded that the intent of Section 2845(3), when read together with Section 2846 and in the light of the earlier statutes, is that the boards of supervisors should not at any time during the life of the franchise . . . so reduce the tolls

as to fail to yield the grantee a return of 15 per cent on the cost of construction or on some other valuation of the property exclusive of the franchise itself."

While the Commission contends that said language, so construed and interpreted, is the language of "regulation," as distinguished from the language of "contract," we are satisfied that the Commission is in error on this point. We shall address ourselves to that matter in a subsequent portion of this Brief. Our purpose at the present time is to point out that as far as the *meaning of the language* of Sections 2845 and 2846 is concerned, the Commission has conceded that our view is correct.

The contract right on which we here rely is one of transcendent importance to investors in the securities of toll bridge companies. The Legislature protected the investors by itself setting the standard of what it meant by the word "disproportionate" so as to prevent regulating authorities from following their own passing whim or fancy as to what they could do.

The facts of this case give pointed significance to the wisdom of the Legislature in itself definitely setting the standard to be followed by the public authorities.

Here we have a case in which several thousand Californians purchased stock of American Toll Bridge Company at $2.00 per share in cash (Coleman, R. 345). From the date of the opening of the Carquinez

Bridge on May 21, 1927, up to December 31, 1935, the stockholders received no dividend whatever on their stock. Approximately one-half the life of the Carquinez and Antioch Toll Bridge franchises expired before the first dividend was declared.

Now, when the time has come when the stockholders might reasonably expect some return to compensate them, in part, for their sacrifices in the past, the Railroad Commission comes along and, in frank disregard of the contract rights claimed by appellant, proceeds to establish a rate of toll as low as it believes that the decisions of this Court bearing on the issue of confiscation will permit, in cases in which there is no contract right.

If the men and women who originally invested their money in the Carquinez Bridge, in reliance on the contract which they believed the Company had with the State of California, had had any premonition that the public authorities would take such action just as soon as the Carquinez Bridge should begin to show earnings available for dividends, we may be reasonably sure that this great pioneer enterprise, which has so distinctly served the public convenience, would never have been constructed.

We respectfully submit that ordinary fairness, as well as the law of the land, require that the public authorities shall respect and comply with contracts entered into in good faith for the construction of great public enterprises.

8. The Supreme Court of California misinterpreted the language of the contract.

Turning now to the decision of the Supreme Court of California, we respectfully submit that said decision makes a patently incorrect analysis of said provisions of Sections 2845 and 2846 of the Political Code, in so far as they form part of the *contract* between the State of California and appellant.

Referring to appellant's position that said Sections 2845 and 2846 accorded to appellant the contract rights which it claims, the Supreme Court of California said (96 Cal. Dec. 367, 373; R. 128):

> "This construction, however, fails to give full import to the language of the section (Section 2846) which prohibits either an *increase* or a *reduction* in the *tolls* unless the receipts are shown to be disproportionate."

Continuing, the court said:

> "*The language contemplates increases as well as reductions* at any time the disproportion is shown to exist, limited by the fifteen per cent maximum. *Such language is inconsistent with any intent to enter into a contract* that a fifteen per cent return will be *assured* to the grantee of the franchise, if the toll rate established produced that much."

The above analysis and reasoning are the foundation on which the court erected the conclusion that the language on which appellant relies is not the language of contract.

We now draw this Court's attention specifically to the fact that the above analysis and reasoning and the conclusion based thereon are fatally defective for the reason that the court has failed to give proper effect to the distinction between *license tax* and the *rate of toll* and has, accordingly, entirely misconstrued the language of the first sentence of said Section 2846.

Section 2845(2) refers to the amount of the *license tax*. The court made no reference to that paragraph and its failure to do so may perhaps account in part for its misconstruction of the first sentence of Section 2846.

Section 2845(3) refers to the *rate of tolls*. We thus have two separate paragraphs of Section 2845 referring separately to these two different items — the license tax and the tolls.

Then comes Section 2846, the first sentence reading as follows:

> "The *license tax* and *rate of toll* fixed as provided in the preceding section must not be *increased* or *diminished* during the term of twenty years, at any time, unless it be shown to the satisfaction of the board of supervisors that the receipts from tolls in any one year is *disproportionate* to the cost of construction or erection, or the fair cash value thereof, together with the cost of all necessary repairs and maintenance of the bridge or ferry."

Without noticing the distinction between the *license tax* and the *rate of toll*, the Supreme Court of Cali-

fornia erroneously held that the words "increased" and "diminished" each applies to **both** the *license tax* and the *rate of toll* and on that erroneous foundation reached the conclusion that we have here a flexible system of ups and downs in the rate, which can spell only a system of flexible regulation by public authority as distinguished from fixed contract rights.

The court's error apparently arose f[illegible]ailure to observe that the words must [illegible] *distributively,* the words "license tax" and [illegible]creased" going together and the words "rate of toll" and "diminished" going together.

If the court's construction that the words "increased" and "diminished" *both* apply to "rate of tolls" and also to "license tax" is correct, then note the following results:

(1) It would follow that the *license tax* cannot be *diminished* unless the yield becomes disproportionate (i.e., in excess of 15 per cent): but that is the very time when, by reason of more moneys in the treasury, the toll bridge company could pay a ***higher*** license tax.

(2) Likewise, it would follow that the *rate of toll* cannot be *increased* unless the yield becomes disproportionate (i.e., in excess of 15 per cent): but that is the very time when, by reason of higher earnings, the rate of toll should be *diminished, not increased.*

The Legislature, of course, could not have intended any such results.

It seems very clear to us that the proper construction must be as follows:

(1) The *license tax* must not be *increased* unless the yield becomes in excess of 15 per cent. In such event, the company has more money and can pay a higher license tax. But, in order to prevent excessive license taxes at such times, the last sentence of Section 2846, which is also overlooked in the court's opinion, provides:

> "The license tax fixed by the board of supervisors must not exceed ten per cent of the tolls annually collected."

(2) The *rate of toll* must not be *diminished* unless the yield becomes in excess of 15 per cent. In that event, fairness to the public requires that the tolls be reduced so that the yield shall not be in excess of 15 per cent, that being the standard of reasonableness established by the Legislature.

Section 2846 *does not provide for any increase in the rate of tolls after they are first written into the ordinance granting the franchise.* The investor must be assumed to enter upon the project with his eyes open. If the rate of tolls written into the ordinance at the time of its adoption by the board of supervisors will not, in the opinion of the proposed toll bridge owner, yield a satisfactory return, he simply declines to accept the franchise; but if he accepts the franchise and constructs the bridge, he must take the consequences if the tolls fail to yield the expected revenue.

On the other hand, the common dictates of fair play require (and the statute, as we believe it must be interpreted, provides) that he has a *contract* right not to be deprived of a *reasonable* return under the standard written into the contract by the Legislature, if the volume of the traffic should confirm his original expectations.

The authorization of such a contract by the Legislature is entirely consistent with the proper demands of public policy. An intending toll bridge constructor has a measure of protection in the event the project is successful and the public has the assurance that the tolls will be reduced in the event the yield becomes greater than that specified under the standard of reasonableness of tolls established by the Legislature. The public thus has the protection referred to by the Supreme Court of California "to be charged not more than a reasonable toll for the use of the bridge" (96 Cal. Dec. 367, 373; R. 128).

Under such a policy, a tremendously hazardous and difficult project such as the Carq z Bridge can be constructed.

Without the contract rights which they thought they were securing, no investors of ordinary common sense would ever have risked their money in such an enterprise. The Carquinez Bridge, the pioneer of all the San Francisco Bay Bridges, would never have been built by private capital.

We believe that the error of the court's construction of Section 2846 is so clear that further comment

would be unwarranted. And with that erroneous construction there falls also the court's conclusion erected thereon, to the effect that the language of Sections 2845 and 2846 of the Political Code, when read into the contract between the County of Contra Costa and the petitioner, is not the language of contract.

9. The authorities cited by the Supreme Court of California do not support the Court's conclusion.

After making what we believe to be an entirely erroneous analysis of the language of said Sections 2845 and 2846 of the Political Code, the Supreme Court of California then referred to a number of decisions of this Court in support of this mistaken conclusion. However, on analysis, it appears that not one of these decisions supports the conclusions of the Supreme Court of California.

In *Spring Valley Water Works v. Schottler*, 110 U. S. 347, the question was simply whether the people of California had reserved power to enact legislation which would have the effect of amending a provision of the charter of a California *corporation*.

Section 31 of Article IV of the original Constitution of California, adopted in 1849, read as follows:

> "*Corporations* may be formed under general laws, but shall not be created by special act except for municipal purposes. *All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed.*"

Spring Valley Water Works was incorporated under the Act of April 22, 1858, entitled "An Act

or the incorporation of Water Companies" (St. 1858, h. 262, p. 218). Section 4 of said Act provided, in art, that the water rates to be charged by corporaions incorporated under said Act should be deterined by a board of commissioners of whom two embers were to be selected by the municipal authoriies, two by the corporation and the fifth, if necesary, by said four.

In 1879, the people of California adopted a new onstitution, including Section 1 of Article XIV proiding, in part, that water rates shall be fixed by the gislative bodies of the municipalities, including the oard of supervisors of a city and county. The Board f Supervisors of the City and County of San Fransco thereafter claimed the right to fix the water ates to be charged by Spring Valley Water Works. he corporation claimed that it had a contract right have its rates fixed by a board of commissioners accordance with said Section 4 of the statute under hich it was incorporated and brought mandamus to ompel the Board of Supervisors to fill a vacancy on e board of commissioners.

It will be noted that the provision, under which e corporation claimed, was a part of the very Act nder which the corporation was incorporated and at the Constitution of 1849 had expressly provided at "all general laws and special acts passed purant to this section (relating to the formation of rporations) may be altered from time to time, or pealed".

This Court, of course, held that the case fell within the familiar rule that the State may amend or repeal a corporation's articles of incorporation, where power so to do had been reserved. Where such reserve power exists, the corporation cannot successfully claim that the provisions of its articles constitute a *contract* with the State, immune from subsequent alteration by the State.

At page 352, Mr. Chief Justice Waite said:

> "The Spring Valley Company is an artificial being created by or under the authority of the legislature of California. The people of the State, when they first established their government, provided in express terms that corporations, other than for municipal purposes, should not be formed except under general laws, subject at all times to alteration or repeal. The reservation of power to alter or repeal the charters of corporations was not new, for almost immediately after the judgment of this court in the Dartmouth College Case (*Dartmouth College v. Woodward,* 4 Wheat. 518), the States, many of them, in granting charters acted on the suggestion of Mr. Justice Story in his concurring opinion (p. 712), and inserted provisions by which such authority was expressly retained. Even before this decision it was intimated by the Supreme Judicial Court of Massachusetts in *Wales v. Stetson,* 2 Mass. 143, that such a reservation would save to the State its power of control. In California the Constitution put this reservation into every charter, and consequently this company was from the moment of its creation subject to the legislative power of

alteration, and, if deemed expedient, of absolute extinguishment as a corporate body."

Continuing, this Court said (p. 355):

"The question here is not between the buyer and the seller as to prices, but between the State and one of its corporations as to what corporate privileges have been granted. *The power to amend corporate charters* is no doubt one that bad men may abuse, but when the amendments are within the scope of the power, the courts cannot interfere with the discretion of the legislatures that have been invested with authority to make them."

In conclusion, this Court said (p. 356):

"It (the provision for fixing rates) was a condition attached to the franchises *conferred on any corporation formed under the statute* and indissolubly connected with the *reserved power of alteration and repeal.*"

In the present case, there is no issue whatever with reference to the amendment or repeal of any provision of the articles of incorporation of American Toll Bridge Company. The decision in the *Schottler* case has never been challenged but the case is simply not in point here.

Stanislaus County v. San Joaquin and King's River Canal and Irrigation Company, 192 U. S. 201, is another case on the same point and is equally inapplicable.

The Canal and Irrigation Company was a California corporation incorporated under the Act of May

14, 1862 (St. 1862, ch. 417, p. 540) entitled "An Act to authorize the Incorporation of Canal Companies and the Construction of Canals". Section 3 of the Act read as follows:

> "Sec. 3. Every company organized as aforesaid shall have power, and the same is hereby granted, to make rules and regulations for the management and preservation of their works, not inconsistent with the laws of this State, and for the use and distribution of the waters and the navigation of the canals, and to establish, collect and receive rates, water rents, or tolls which shall be subject to regulation by the board of supervisors of the county or counties in which the work is situated, but which shall not be reduced by the supervisors so low as to yield to the stockholders less than one and one-half per cent per month upon the capital actually invested."

It will be noted that the provision for a return of not less than 1½ per cent per month was here *incorporated into the very act of incorporation itself. It was thus part of the corporation's charter.*

On March 12, 1885, there was approved an Act (St. 1885, ch. 115, p. 95) providing, among other matters, that the boards of supervisors in the respective counties should fix water rates so as to yield a net return of "not less than six nor more than eighteen per cent" upon the specified rate base.

It will be observed that this statute amended and changed the above-quoted provision *of the Act under which the corporation was incorporated,* by providing for a return as low as six per cent.

The Board of Supervisors fixed rates which yielded a rate of return substantially lower than the one and one-half per cent per month specified in the statute under which the corporation was incorporated. The corporation then applied to the Federal Courts for an injunction. This Court directed that a favorable judgment of the U. S. Circuit Court be reversed and that the bill be dismissed without prejudice.

This Court, in a decision by Mr. Justice Peckham, first held that the above-quoted provision from the Act under which the corporation was incorporated was not intended by the State as a contract (p. 211). Continuing, this Court said (p. 211):

> "*Second. But assuming there was a contract,* we think the *rates could be changed* under that provision of the constitution of the State adopted in 1849, article 4, section 31, which provided:
>
> "'*Corporations* may be formed under general laws, but shall not be created by special act except for municipal purposes. *All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.*'
>
> "This court has had frequent occasion to discuss the meaning and extent of the power thus reserved, as it exists in about all the States, either by constitutional or statutory provisions."

After reviewing a number of the Court's earlier decisions, this Court concluded on this point as follows (p. 213):

"* * * and we are quite clear that, even assuming there was a contract, the legislature nevertheless had the power to so alter and amend the act of 1862 (the act of incorporation) as to provide for the fixing of rates as set forth in the act of 1885."

It thus appears that this case, also, is one of the reserved power of the Legislature to amend the laws under which corporations are incorporated and that the case is not in point here for the reason that there is here no question whatever as to repeal or amendment of any provision of the articles of incorporation of American Toll Bridge Company. The Company here claims under sections of the Political Code which have nothing to do with the articles of incorporation of any corporation.

In *Railroad Commission of California v. Los Angeles Railway Corporation*, 280 U. S. 145, the question was whether the State of California had authorized the City of Los Angeles to write into street railway franchise ordinances provisions as to rates of fare which should have the force of contract and should be binding on the State as well as the City. The Railroad Commission and the City of Los Angeles took the position that the State had granted such authority and that the Street Railway Company was, accordingly, precluded by contract from increasing its 5 cent fares. The Street Railway Company insisted that the asserted authority had *not* been granted *by the State to the City* and prevailed on that issue.

This Court recognized fully the *power* of the State to grant such authority to municipalities and other

political subdivisions of the State. On this subject, the Court, speaking through Mr. Justice Butler, said (p. 151):

"1. It is possible for a State to authorize a municipal corporation by agreement to establish public service rates and thereby to suspend for a term of years not grossly excessive the exertion of governmental power by legislative action to fix just compensation to be paid for service furnished by public utilities. *Detroit v. Detroit Citizens' R. Co.*, 184 U. S. 368, 382. *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, 508, 515. *Public Service Co. v. St. Cloud*, 265 U. S. 352, 355. And where a city, empowered by the State so to do, makes a contract with a public utility fixing the amounts to be paid for its service, the latter may not be required to serve for less even if the specified rates are unreasonably high. *Detroit v. Detroit Citizens' R. Co., supra*, 389."

However, the Court found that on the *facts* of that case, the State had not granted such authority to the City of Los Angeles. The Court reached this conclusion following examination of certain provisions of the Civil Code, the Broughton Act and the charter of the City of Los Angeles (pp. 153-156). The language of these provisions is widely different from the provisions of Sections 2845 and 2846 of the Political Code which are determinative on this point in the present case.

The question at issue in the *Los Angeles Railway Corporation* case was whether the State had conferred

on a *political subdivision* the authority to make a certain contract on the subject of rates or fares. In the present case, the issue is entirely different. The State here had clearly conferred on the County of Contra Costa authority to enter into a franchise contract. There is no question here as to whether the State had authorized a political subdivision to write into the contract the crucial words in the present case, for the reason that said words were *not* written into the contract by the Board of Supervisors. *They were written into it by the State itself, acting through its Legislature.* The Board of Supervisors had nothing to do with said words. They were written into the contract by the State itself and were provided for when the State enacted said Sections 2845 and 2846 of the Political Code.

Hence there is here involved no question as to whether or not the State had delegated to a political subdivision the authority to write words of contract into a franchise ordinance.

The act was that of the State itself. And it has not even been argued, much less demonstrated, that the State itself lacked authority to do what it did.

Under the circumstances, the *Los Angeles Railway Corporation* case is not in point on the issue now before this Court.

In *Home Telephone and Telegraph Company v. City of Los Angeles*, 211 U. S. 265, this Court found that *on the facts of that case* the Legislature had not conferred upon the City of Los Angeles the power to

contract with reference to telephone rates. Speaking through Mr. Justice Moody, the Court, at page 273, states the rule as follows:

> "It has been settled by this court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S. 368, 382; *Vicksburg v. Vicksburg Water Works Co.*, 206 U. S. 496, 508."

Here, as in the *Los Angeles Railway Corporation* case, supra, the question at issue was whether the Legislature had delegated to a political subdivision of the State of California the right to contract with designated classes of public utilities with reference to the rate of fare or toll. As we have hereinbefore pointed out, the question now before this Court is quite different, for the reason that the language here under consideration (Sections 2845 and 2846 of the Political Code) was written into the contract not by the subordinate political agency but *by the Legislature itself*. In the case now before this Court, no question arises with reference to the authority of a political subdivision. We do not believe that anyone will challenge the right of the Legislature itself to enact the provisions here under consideration and to make them a part of a franchise contract.

In *Covington and Lexington Turnpike Road Company v. Sandford*, 164 U. S. 578, the governing facts were quite different from those which are set forth in the reference made by the Supreme Court of California to that decision (96 Cal. Dec. 367, 3734; R. 129).

It appeared that Covington and Lexington Turnpike Road Company was incorporated by an Act of the Legislature of Kentucky approved on February 22, 1834, with authority to construct and permanently maintain a turnpike road from Covington to Lexington, Kentucky. By the nineteenth section of the Act, the company was authorized to collect certain specified tolls. Section twenty-six provided as follows (p. 581):

> "That if at the expiration of five years after said road has been completed, it shall appear that the annual net dividends for the two years next preceding the said company, upon the capital stock expended on said road and its repairs, shall have exceeded the average of *fourteen per cent per annum* thereof, then and in that case, the legislature reserves to itself the right, upon the fact being made known, to reduce the rates of toll, so that it shall give that amount of net dividends per annum, and no more." Acts of Kentucky, 1833, pp. 537, 548.

The Turnpike Company contended and this Court agreed that said section twenty-six was part of the defendant's *contract* with the State and that it granted to the Turnpike Company a *contract* right to the earning therein specified (pp. 581, 586).

The questions before this Court in that case arose out of *subsequent statutes* by which two new turnpike corporations were later incorporated and the turnpike company to whom the above rights had been granted in 1834 passed out of existence. The question at issue was simply whether or not the above contract rights had passed over to the two new corporations. The Court found that the situation as to the two new corporations was entirely different from the situation as to the original corporation and that the Legislature had not provided that the two new corporations should have contract rights similar to those of the original corporation.

At page 586, the Court, speaking through Mr. Justice Harlan, states the question at issue as follows:

> *"Was the Covington and Lexington Turnpike Road Company entitled, under its charter, to be exempt from legislation that would prevent it from earning at least fourteen per cent 'upon the capital stock expended upon said road and its repairs', as prescribed in the act of 1834?"*

Referring to said question, the Court said (p. 586):

> *"The act of 1834 having given to the original corporation an exemption or immunity from legislation that would prevent it from earning as much as fourteen per cent upon the capital stock expended upon its road and for repairs, the contention of the defendant is that this exemption or immunity passed to the two corporations created by the act of 1851* and which, by the terms of that act, succeeded 'to all' the powers, rights

and capacities' granted by the act of 1834 to the original corporation."

This Court here found very definitely that that Act of 1834 gave to the original turnpike corporation an exemption or immunity from legislation which would prevent it from earning as much as fourteen per cent upon the capital stock expended upon its road and for repairs. Basing its decision on that assumption, the Court then went on to consider the entirely different question as to whether or not the Legislature had granted these contract rights *to the two new turnpike companies.* This question the Court answered in the negative.

The entire decision proceeds on the assumption that section twenty-six of the Act of 1834 formed part of the *contract* between the Turnpike Company and the State and that the Turnpike Company's rights under said *contract* were entirely valid. Under said decision, there is no question that said contract rights would have continued in full force and effect had it not been for the entire change in circumstances under which two new turnpike companies were created and the old company went out of existence without any action by the Legislature clearly conferring on the two new turnpike companies the contract rights which had been originally conferred upon the first turnpike company.

Hence, the *Covington* case, instead of being authority to support the decision of the Supreme Court of California, has the very opposite effect.

The above cases are the only cases relied on by the Supreme Court of California in support of its conclusion on the issue of impairment of contract obligations. We respectfully submit that none of these cases, when properly considered, supports the conclusion reached by the Supreme Court of California.

10. The Supreme Court of California failed to give effect to the decisions of this Court and other Federal courts which sustain the authority of a State legislature to grant or authorize the granting of contract rights, equally binding on both parties, as to the rates to be charged by common carriers or public utilities.

While it is, of course, true that the surrender by contract of a power of government will be closely scrutinized (*Home Telephone and Telegraph Company v. City of Los Angeles,* 211 U. S. 265, 273), it is also true that the reports of the decisions of this Court and other Federal courts are full of cases in which the court recognized the authority of the legislature to make, or to authorize the making of, contracts containing definite public utility rates or fares which could not be changed by public authority during a specified reasonable time, or only if the yield should become greater than the one specified in the contract, and found that on the facts of the case such contract had been lawfully entered into.

Among these cases are the following decisions of this and other Federal courts:

Los Angeles v. Los Angeles City Water Company, 177 U. S. 558;

Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 368, 382, 384, 386;

City of Cleveland v. Cleveland City Railway Company, 194 U. S. 517;
Vicksburg v. Vicksburg Waterworks Company, 206 U. S. 496, 508;
City of Minneapolis v. Minneapolis Street Railway Company, 215 U. S. 417, 436;
Detroit United Railway v. State of Michigan, 242 U. S. 238, 251, 253;
Columbus Railway, Power & Light Company, v. City of Columbus, 249 U. S. 399, 409-10;
St. Cloud Public Service Company v. City of St. Cloud, 265 U. S. 352, 359-64;
Omaha Water Co. v. City of Omaha, 147 Fed. 1;
Columbus Railway, Power & Light Co. v. City of Columbus, 253 Fed. 499, 503-5;
Hillsdale Gaslight Co. v. City of Hillsdale, 258 Fed. 485, 487-8;
Nebraska Gas & Electric Co. v. City of Stromsburg, 2 Fed. (2d) 518, 521-2;
Cincinnati, N. & C. Ry. Co. v. City of Cincinnati, 71 Fed. (2d) 124, 125.

We invite the Court's particular attention to the first of the above cases, *Los Angeles v. Los Angeles City Water Company*, 177 U. S. 558. In that case it appeared that in 1868 the City of Los Angeles leased to Griffin and two associates its water works for a term of thirty years and granted the right to lay pipes in the streets and to take water from the Los Angeles River. The ordinance contained the following proviso (p. 570):

> "Always provided, that the mayor and common council of said city shall have, and do reserve the right to regulate the water rates charged by said parties of the second part, or their assigns, *provided* that they shall not so reduce such water rates, or so fix the price thereof, to be less than those now charged by the parties of the second part for water."

On April 2, 1870, the Legislature passed an Act in terms ratifying and confirming said contract (p. 571). In this respect, the case is similar to that now before this Court, in which, as we have shown, it appears that the Legislature of California, about two months subsequent to the enactment of Ordinance No. 171, enacted legislation expressly ratifying and confirming the franchise granted by said Ordinance (St. 1923, ch. 131, p. 272).

In holding that the above contract was valid and that the City of Los Angeles was precluded by its contract from reducing water rates to a point below those which were being charged at the time when the contract was entered into, this Court, speaking through Mr. Justice McKenna, said (p. 570):

> "We think, therefore, the power to regulate rates was an existent power, not granted by the contract, but reserved from it, with a single limitation—the limitation that it should not be exercised to reduce rates below what was then charged. *Undoubtedly there was a contractual element; it was not, however, in granting the power of regulation but in the limitation upon it.*"

So, in the present case, the contractual element is found in the *limitation* upon the power of regulation of appellant's tolls, i. e., in the contract provision that the Board of Supervisors should not reduce the tolls unless it first be found that they were yielding a return in excess of 15 per cent upon the specified rate base.

When the Railroad Commission stepped into the shoes of the Board of Supervisors of Contra Costa County as the public agency to regulate the tolls charged by American Toll Bridge Company, it did so subject to the express contractual limitation upon the rate making power established by the contract between the State of California, acting through the Board of Supervisors of Contra Costa County, and appellant's assignor.

The above listed cases are principally cases in which the question at issue was whether or not the Legislature could confer on a subordinate political subdivision authority to enter into a binding contract as to common carrier or public utility rates for a reasonable period of time.

As already pointed out, the case now before this Court is even simpler, for the reason that the determining language of the contract was written into it, not by a subordinate political agency, but by the Legislature itself, when it enacted Sections 2845 and 2846 of the Political Code.

We are unable to find in the decision of the Supreme Court of California any reference to this dis-

tinction nor anything to show that the court understood that the present case is one in which there can be no question of the authority of the Legislature to act.

In the present case, there is no intermediate hurdle resulting from a question as to whether or not the Legislature had authorized a subordinate political agency to enter into a particular contract or to insert into a contract particular terms and conditions.

On the other hand, as we have hereinbefore pointed out, this Court, in the *Covington* case, supra, assumed, as the foundation for its decision, that a statute providing for a yield up to 14 per cent per annum conferred upon the Turnpike Company *a contract right* not to have the existing rates reduced unless that yield was being exceeded.

To the same effect, we cite ***Ball v. Rutland Railroad Company***, 93 Fed. 513. In that case, it appeared that a railroad charter granted "the right to receive and collect toll or compensation at such rates as the directors may, from time to time, prescribe and establish, for the conveyance and transportation of all passengers and freight over their road, or any part thereof". It was provided, however, that the Supreme Court of Vermont might alter said rates "for a term not exceeding ten years at any one time, as said court may judge reasonable, and in such manner that the *income* of said company ***shall not be reduced below twelve per cent per annum on the amount of its capital stock, after deducting all expenses*** (p. 514).

The court held that this charter provision constituted a *contract* between the State and the Railroad Company and in this connection said (p. 516):

> "The *contract* between the state and the predecessor of the defendant railroad company here for the building and operating this road was that the corporation should always have the right to demand and receive such fares as the directors might fix, which could be reduced by the Supreme Court of the state only, and not below 12 per cent. on the capital stock. This rate is large, but the risk was great; and the limit was fixed, in view of the whole, by the legislative discretion."

Bearing on the volume of the rate, we desire to point out that in our case, also, the risk was great. It was, no doubt, in recognition of this fact, as applied to such toll bridges as might thereafter still be constructed in California, that the Legislature, when, as late as 1923, it amended Section 2845 of the Political Code in minor respects, retained the 15 per cent provision (St. 1923, ch. 141, 288).

It is thus evident that the Supreme Court of California failed to give effect to the decisions of this Court and of lower Federal courts sustaining the authority of a State legislature to enter into, or authorize the entering into of, contracts naming specified rates or fares or rates of return and to the decisions upholding such contracts in situations analogous to the present case.

11. The order of the Railroad Commission of California impaired the obligations of appellant's said contract, in violation of appellant's rights under Section 10 of Article I of the Constitution of the United States.

We have shown:

(1) That, as decided by the Supreme Court of California in *County of Contra Costa v. American Toll Bridge Company,* 10 Cal. (2d) 359, said Ordinance No. 171 constitutes a *contract,* in which the parties "agree" to its provisions and that it is obviously unfair to hold that appellant is bound by the *burdens* of the contract but may not avail itself of its *benefits;*

(2) That the provisions of said Sections 2845 and 2846 of the Political Code of California were read into and became a part of said contract;

(3) That there is agreement between the Railroad Commission and appellant as to the meaning of said Sections 2845 and 2846 to the effect "that the boards of supervisors should not at any time during the life of the franchise . . . . . so *reduce* the tolls as to fail to yield the grantee a return of 15% on the cost of construction or on some other valuation of the property exclusive of the franchise itself" and that the only disagreement between said parties is with reference to the legal effect of said language;

(4) That the legislative history of toll bridge construction and operation in California preceding and leading up to the enactment of said Sections 2845 and 2846 of the Political Code shows that it was the intention of the Legislature, in enacting said sections,

to protect, by contract rights, the grantees of toll bridge franchises.

(5) That the plain meaning of the provisions of said Sections 2845 and 2846 of the Political Code is that contract rights are offered to such grantees and that, unless so construed, said words merely constitute a "delusion and a snare";

(6) That the construction placed upon said provisions by the Supreme Court of California was the result of an obvious error as to the meaning of the words; and

(7) That in all of its legislation relating to toll bridge corporations subsequent to 1872, the Legislature has been careful to preserve to toll bridge owners all rights granted to them by the franchise ordinances enacted under said provisions of the Political Code.

The record in this case shows and the Supreme Court of California found that at no time has the income from the Carquinez Bridge equalled "the designated 15 per cent" (96 Cal. Dec. 367, 373, R. 128).

As the appellant had a *contract* right not to have its existing tolls *reduced* unless they had first been found to yield in excess of 15 per cent on the specified rate base, we respectfully submit that the Railroad Commission's order clearly impaired the obligation of appellant's contract, in violation of appellant's rights under Section 10 of Article I of the Constitution of the United States.

II.

PROCEDURAL DUE PROCESS.

We next submit that the *procedure* of the Railroad Commission constituted a denial of *procedural due process* of law for each of the reasons which we shall specify.

In using the words "procedural due process", we use them as they were defined by this Court, speaking through Mr. Chief Justice Hughes, in *Railroad Commission of California v. Pacific Gas and Electric Company,* 302 U. S. 388, as follows (pp. 392-3):

> "*procedural due process,* that is, whether the Commission in its procedure, as distinguished from the effect of its order upon respondent's property rights, failed to satisfy the requirements of the Federal Constitution."

We have in mind that this Court has freqfiently found that orders of various administrative tribunals, Federal and State, were void because the procedure of the tribunal failed to accord *procedural due process.* Among the more recent of these decisions are the following:

Northern Pacific Railway Company v. Department of Public Works of the State of Wash- comments in *Railroad Commission of California v. Pacific Gas and Electric Company, ington,* 268 U. S. 39, 44-45 (see approving 302 U. S. 388, 399, 415-16);

Chicago, Milwaukee & St. Paul Railway Company v. Public Utilities Commission of the State of Idaho, 274 U. S. 344, 350-1 (see approving comments in 302 U. S. 388, 399

West Ohio Gas Co. v. Public Utilities Commission of Ohio (No. 2), 294 U. S. 79, 81-2;

West v. Chesapeake & Potomac Telephone Company, 295 U. S. 662, 675, 679 (see approving comments in 302 U. S. 388, 399-400, 417-18);

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292, 300, 304-307.

Morgan v. United States, 304 U. S. 1, 22; and on Petition for Rehearing, p. 23.

We understand that where the case presents issues of both (a) procedural due process and (b) confiscation, the Court first examines the issue of procedural due process. If the Court finds a denial of procedural due process, the Court reverses the judgment or decree without going further to analyze also the facts bearing on the issue of confiscation. See each of the cases next hereinbefore cited.

On the other hand, if in such case the Court finds that there has been no denial of procedural due process, it then addresses itself to the issue of confiscation.

Railroad Commission of California v. Pacific Gas & Electric Company, 302 U. S. 388, 393-4;

United Gas Public Service Co. v. Texas, 303 U. S. 123, 138, 142.

We shall follow the Court's usual approach by considering, first, the issue of procedural due process

and, next, the issue of confiscation. In so doing, however, we express the opinion that the case may and should be decided in favor of appellant without the necessity of analyzing the facts bearing on the issue of confiscation.

A.

A. THE PROCEDURE OF THE RAILROAD COMMISSION CONSTITUTED A DENIAL OF DUE PROCESS OF LAW UNDER THE PRINCIPLES MOST RECENTLY STATED BY THE COURT IN MORGAN v. UNITED STATES, 304 U. S. 1.

We believe that this is an appropriate case in which the Court may declare that the principles of procedural due process of law, as most recently declared by this Court in the great decision in *Morgan v. United States,* 304 U. S. 1, in the case of a *Federal administrative official, are equally* applicable to the procedure of *State administrative tribunals.*

1. The Morgan case.

In *Morgan v. United States,* 304 U. S. 1, decided on April 25, 1938, the question at issue was the validity of an order of the Secretary of Agriculture fixing the rates to be charged by market agencies at the Kansas City stockyards. The question arose under the Packers and Stockyards Act, 1921, 42 Stat. 159, 7 U. S. C. A., sec 181-229.

In holding that the requirements of procedural due process of law had not been met, this Court, speaking through Mr. Chief Justice Hughes, pointed out that "in administrative proceedings of a quasi-judicial character, the liberty and property of the citizen shall

be protected *by the rudimentary requirements of fair play*" (pp. 14-15).

Continuing, Mr. Chief Justice Hughes stated the crux of the decision as follows (pp. 18-19):

> "*Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.*"

The Court then examined the procedure before the Secretary of Agriculture in order to determine whether or not the appellants "in their contest with the Government in a quasi-judicial proceeding aimed at the control of their activities" had or had not been "fairly advised of what the Government proposes" and whether or not they had been "heard upon its proposals before it issues its final command".

As bearing on said questions, which constituted the real issue in the case, this Court naturally addressed itself primarily to the question *whether or not the issues had been properly defined*. That would be the normal and usual way of advising "what the Government proposes".

In pursuing its inquiry, the Court found (p. 19):

(1) The proceeding was initiated by a mere notice of inquiry into the reasonableness of appellant's rates;

(2) No specific complaint was formulated:

(3) There was no report by an examiner and no proposed findings were served by the Government;

(4) While there was oral argument, counsel for the Government did not adequately state the Government's claims; and

(5) The Government did not file a brief.

Based upon that analysis of the procedure, the Court concluded that appellants had not been advised of what the Government proposed and had been denied due process of law (pp. 19, 22).

At page 20, the Court stressed the point that in all substantial respects the Government was prosecuting the proceeding and that "the proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other". In such a proceeding, said the Court, the appellants are entitled

> "to have a reasonable opportunity to know the claims advanced against them" (p. 21).

At page 22, the Court concluded:

> "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these

multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, *they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."*

As the procedure before the Secretary failed to accord procedural due process, the decree of the District Court upholding the Secretary's order, was reversed (p. 22).

We understand the decision to mean that in a quasi-judicial proceeding instituted by the Government against a public utility it is the duty of the Government, in some appropriate way, to advise the party against whom the Government is proceeding "of what the Government proposes" and to give him a fair opportunity "to be heard upon its proposals before it issues its final command".

In ascertaining whether or not that requirement has been met, the Court naturally asks itself the following questions:

Were the issues defined in the usual way by complaint and answer?

If not, did counsel for the Government advise what the Government proposed by some statement at the hearing or in oral argument?

If not, did counsel give the requisite information in a brief?

If not, did the administrative tribunal serve proposed findings or an intermediate report?

If not, did the Government, in any other way, announce "its proposals before it issues its final command?"

In the *Morgan* case, the Government had done none of these things. As we shall shortly show, in the case now before this Court, the Railroad Commission did none of them: On this issue of procedure, the two cases are completely identical.

This Court did not say that procedural due process necessarily requires the service of proposed findings or an intermediate report. Such findings or report, it is true, would be one way to meet the requirements of procedural due process, even though no complaint and answer had been filed. However, in the absence of such findings or report, the Government could still meet the requirements of procedural due process in some one of the other ways hereinbefore specified. However, neither in the *Morgan* case nor in the present case were these requirements met in any way whatever.

On May 16, 1938, this Court decided the case of *National Labor Relations Board v. Mackay Radio & Telegraph Company*, 304 U. S. 333. In that case, the requirements of procedural due process had been met in three different ways, as follows:

(1) **Complaint and answer.**

The rules of the National Labor Relations Board provide that formal proceedings are instituted through the filing and service by the Board of a formal complaint, to which is attached a copy of the charge. The

respondent then files a formal answer (Rules and Regulations, National Labor Relations Board, Series 1, as amended, Article II, Sections 5-10). In the *Mackay* case, this procedure had been followed. The Board had filed a formal complaint, to which the respondent had filed a formal answer. After the completion of its testimony, the Board filed an amendment to the complaint. The respondent filed a general denial to the amended complaint and presented its evidence (p. 340). It thus appears that there is no possible question but what the issues had been formulated by formal complaint and answer.

(2) Oral argument.

The Court specifically pointed out that "oral argument was had" (p. 350), at which time it may be assumed that counsel for the Government again stated the Government's proposals.

(3) Brief.

Likewise, briefs were filed prior to the decision of the Board (p. 350).

Under these circumstances, this Court, of course, held that the mere failure of the Board to follow its usual practice of submitting a tentative report by a trial examiner and of hearing exceptions to such report did not deprive respondent of procedural due process. As this Court, speaking through Mr. Justice Roberts, said (p. 351):

> "The Fifth Amendment (here the Fourteenth Amendment) guarantees no particular form of

procedure; it protects substantial rights. Compare *Morgan v. United States,* 298 U. S. 468, 478."

In the *Morgan* case and in the present case, however, in no way whatever did the Government formulate any issues or give advice "of what the Government proposes".

On May 31, 1938, this Court rendered and filed its decision on the petition of the Government for a rehearing in the *Morgan case* (304 U. S. 23-26). The Court again emphasized the crux of its decision in the *Morgan* case by restating the language hereinbefore quoted by us, as follows (p. 25):

"We said:

'Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

'No such reasonable opportunity was accorded appellants. * * *' "

2. The facts in the present case fall squarely within the decision in the Morgan case.

Turning now to the facts in the present case, bearing on the issue of the *procedure* before the Railroad Commission, it appears at once that those facts fall squarely within the decision in the *Morgan* case.

Here, as in the *Morgan* case, appellant was brought into contest with the Government (the State) in a

quasi-judicial proceeding aimed at the control of appellant's activities.

Here, as there, the Government prosecuted the proceeding. Here, as there, the proceeding had all the elements of contested litigation, with the Government and its counsel on the one side and appellant and its counsel on the other (R. 203).

In examining the facts to ascertain whether appellant was fairly, or at all, advised of what the Government proposed, what do we find?

(1) Here, as in the *Morgan* case, the proceeding was initiated by a mere order or notice of inquiry. Copy of the document is attached as Exhibit "B" to the Petition to the Supreme Court of California for Writ of Review (R. 30).

Said document provides, in the most general terms, for an investigation "into the reasonableness of the rates, charges, contracts, classifications, rules and regulations, or any thereof, now charged or enforced by American Toll Bridge Company in the operation of" the Carquinez Bridge.

Whether the investigation and the final order would relate to appellant's fares for passengers or for the various types of passenger vehicles or to appellant's rates for freight or to the trucks transporting the same or to appellant's contracts or to its classifications of passengers or commodities, or to its rules and regulations, or to which thereof, appellant had no means of knowing.

Where, among all these matters, the lightning would strike, or what the State's proposals were, appellant, at no time prior to the decision, had any means of knowing.

(2) Here, as in the *Morgan* case, no charge or complaint, either formal or informal, was ever filed.

(3) Here, as in the *Morgan* case, there being no complaint, no answer was or could be filed and no issues were ever defined by any pleadings.

(4) Here, as in the *Morgan* case, the State did not make known what it proposed, by any oral argument or by any brief setting forth such proposals.

(5) Here, as in the *Morgan* case, the State at no time prior to the decision, ever advised appellant of what it proposed to do, by means of proposed findings, or intermediate report.

(6) Here, as in the *Morgan* case, *by no means whatever,* did the State ever advise appellant "of what the Government proposes" or give appellant a fair or any opportunity "to be heard upon its proposals before it issues its final command".

The following language from the *Morgan* case applies exactly to the present situation (p. 19):

"And the appellants had no further information of the Government's (State's) concrete claims until they were served with the Secretary's (Railroad Commissions) order."

The opinion of the Supreme Court of California contains the following sentence (96 Cal. Dec. 367, 381; R. 140):

> "It is not contended that the petitioner was not fairly informed of what the issues were to be or that the issues were not clearly defined and understood by all parties concerned during the course of the hearing."

We submit, very respectfully, that there was and is no justification whatever for that statement.

We here restate what we said on this matter in our Petition for Rehearing before the Supreme Court of California, as follows (R. 193):

> "We do not understand how the court could make such a statement. It is absolutely contrary to the facts. Petitioner has contended, most earnestly, and does now contend that it was not informed, fairly or at all, of what the issues were to be; also that the issues were not defined, clearly or at all; also that there were no issues and hence petitioner did not understand and could not have understood what they were at any time prior to the Railroad Commission's decision.
>
> "The court's statement puts petitioner into an entirely false position. The statement is not warranted by anything which petitioner has at any time said or done.
>
> "We respectfully ask that on rehearing said entire sentence be eliminated from the Decision."

The Railroad Commission had the right, under the rules of the Supreme Court of California, to file an

Answer to said Petition and did so (R. 195), but counsel for the Commission did not dispute the accuracy of the above-quoted language, from our Petition for Rehearing, nor could they have done so fairly.

The Supreme Court of California made no comment on any point raised in our 87 page printed Petition for Rehearing and merely said "The Petition for a rehearing herein is denied".

We again take respectful, but most vigorous exception, to the court's above-quoted sentence.

In leaving this matter, we assume that no State court, by any such unfounded statement, can preclude an appellant from urging, in this Court, the denial of a Federal right.

It will be conceded that the procedure followed by the Railroad Commission in the present case, namely, investigation by the Commission on its own initiative without the filing of any charge or of any complaint and answer, has been used by the Commission in only a relatively few cases. Almost all the formal cases before the Railroad Commission of California are handled by complaint by some third party and answer thereto. The question now before this Court does not relate to those cases, in which issues are defined in the usual way by complaint and answer, but only to the comparatively rare cases in which the proceedings are initiated by the Railroad Commission itself on its own motion and only to those of such cases in which the Railroad Commission fails to advise the defendant, prior to the actual decision, of what the Commission's proposals are.

We believe that the point which we are now presenting is one of the most important issues in the present case. The question is simply this—

> "Is there any reason why the principle of the *Morgan* case, clearly applicable to the proceedings of *Federal* administrative tribunals, is not equally applicable to the proceedings of *State* administrative tribunals?"

We submit that the principle is applicable to all administrative tribunals, whether established by the *Federal* government or by a *State* government.

We believe it too clear for further argument that the facts of the present case fall squarely within the decision in the *Morgan* case and that in the light of that decision alone the judgment of the Supreme Court of California should be reversed.

B. THE PROCEDURE OF THE RAILROAD COMMISSION CONSTITUTED A DENIAL OF DUE PROCESS OF LAW BECAUSE THE COMMISSION FAILED TO MAKE FINDINGS AS TO FAIR VALUE OR A PROPER RATE BASE AND TO MAKE ANY OF THE OTHER NECESSARY BASIC OR ESSENTIAL FINDINGS

1. Duty of administrative tribunal to make basic or essential findings

It is elementary that it is the duty of an administrative tribunal such as the Railroad Commission of California to make "the basic and essential findings required to support the Commission's order".

In *Florida v. United States*, 282 U. S. 194, the order under consideration was an order of the Interstate Commerce Commission dealing with rates on logs

moving by railroad between points within the State of Florida. The Commission had made a general finding that the intrastate rates theretofore in effect resulted in "unjust discrimination against interstate commerce", but no findings were made upon the basic and essential facts underlying this ultimate fact. In setting aside the Commission's order because of the failure to make proper findings, this Court, in a decision by Mr. Chief Justice Hughes, said (p. 215):

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company v. United States*, 282 U. S. 74) but of the lack of the *basic or essential findings required to support the Commission's order*. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make the findings for the Commission but to ascertain whether its findings are properly supported."

In *Atchison, Topeka & Santa Fe Railway Co. v. United States*, 295 U. S. 193, this Court, speaking through Mr. Justice Butler, said (p. 201):

> "But the Commission (Interstate Commerce Commission), in respect of the shipments covered by its order, made *no definite finding* as to what con-

stitutes complete delivery or where transportation ends. Its report does not disclose the *basic facts* on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. *In the absence of a finding of essential basic facts, the order cannot be sustained. Florida v. United States,* 282 U. S. 194, 215. *Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. Panama Refining Co. v. Ryan,* 293 U. S. 388, 433. See *Beaumont, S. L. & W. Ry. v. United States,* 282 U. S. 74, 86. *Interstate Commerce Commission v. Chicago, B. & Q. R. Co.,* 186 U. S. 320, 341."

Again, in the very recent case of *Saginaw Broadcasting Co. v. Federal Communications Commission,* 96 Fed. (2d) 554, decided on March 16, 1938 by the United States Court of Appeals for the District of Columbia, the court said (p. 559):

"The requirement that courts, and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the

factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided according to the evidence and the law or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commissions as it is in respect of courts."

Continuing, the court said (p. 560):

"Our conclusions on this topic are, we think, confirmed by the decisions of the Supreme Court which consider what findings of fact are necessary in reports of the Interstate Commerce Commission. Section 14 of the Interstate Commerce Act, 34 Stat. 589, 49 U. S. C. § 14 (1934), requires only that the report of the Commission shall state its conclusions, unless damages are to be awarded. Nevertheless, *the Supreme Court has laid down the rule that,* although under this section formal findings of fact are not required, *substantial findings of the basic and essential facts necessary to support the order must appear.*"

It is, of course, well established that this Court may set aside an order of an administrative tribunal for lack of findings necessary to support it (Mr. Justice Brandeis, concurring, in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 74).

2. Necessary findings in public utility rate cases.

The subjects on which it is necessary for a Commission, fixing the rates to be charged by a public utility to make findings of fact, are clearly set forth by this Court in its very recent decision in *United Gas Public Service Co. v. Texas*, 303 U. S. 123. In its discussion of "procedural due process", this Court, speaking through Mr. Chief Justice Hughes, enumerated said subjects as follows (pp. 138-9):

Value of the property.

Estimated gross revenue from Commission's rates.

Estimated expenses, including allowance for depreciation.

Rate of return.

The Company requested findings on only "materials and supplies, working capital, going value and certain other items" (p. 141). This Court pointed out that these items did not include all the items which the jury should consider "as for example, the questions of *operating revenues, operating expenses* and *return*".

That the Commission must make findings on said basic and essential factors is too well settled to justify further citation of authorities.

3. Railroad Commission failed to make any of the basic or essential findings.

We turn now to the Railroad Commission's decision to ascertain whether or not the Commission made the "basic or essential findings required to support the Commission's order".

A copy of the Commission's decision is attached to the Petition to the Supreme Court of California for Writ of Review (R. 31).

A review of that decision will show that the Commission failed to make findings as to fair value or any rate base and to make any of the other necessary basic or essential findings.

After narrating certain historical and other preliminary matters, the Commission (R. 37) sets forth certain figures in the evidence (not findings by the Commission) as to "the cost or value of the bridge properties" as contained in various exhibits offered by witnesses of the Commission and the appellant. These figures refer to the Carquinez Bridge alone.

At no point in the decision does the Commission state which, if any, of said figures it finds to be correct. *Nor does the Commission anywhere state which, if any, of said figures, it adopts as representing the fair value of the property or as a proper rate base.*

Nowhere in the decision does the Commission set down any number of dollars as being either the fair value of the property or a proper rate base.

There is no finding whatever on this "basic and essential fact".

The only paragraphs in the decision dealing with the actual making of the rate for 1938 are as follows (R. 38):

"In Exhibit 134 the respondent's witness estimated that with the same revision in rates (i. e. 50¢) an induced traffic of 11% might be expected which should produce for the year 1938 from the operation of the Carquinez Bridge a net income, before allowances for federal income and state franchise taxes, of $629,799. An allowance for these items, based on the estimated revenue for 1938, would produce a net amount during 1938 available for return of approximately $575,000. At the closing hearing in this matter, however, this witness modified his estimates and concluded that an increase of 13.5% might be expected which would produce an average annual income of approximately $14,550 in excess of that appearing in his exhibit, bringing the total estimated net return up to approximately $590,000.

"A reduction in rates will stimulate the traffic over the bridge, although the extent, of course, cannot be estimated with exactitude. The results estimated for the 1938 revenue should produce a return of approximately 7.5% on the investment in the bridge structure. When tested upon the bases usually followed by the Commission such a rate of return is reasonable for this particular company, considering the unusual circumstances under which its properties were constructed and have been and are operated. However, for the time being, in order that the company may be assured of financial stability and to guard against possible inaccuracies in the estimate of induced

traffic, by reason of rate reductions, a rate slightly higher than that proposed should be authorized.

"Accordingly, I am of the opinion that a toll of 45¢ per car and of 5¢ for each passenger should be authorized for operations over the Carquinez Bridge. Such a rate should enable the company to meet its requirements under its trust indenture and amortization and dividend requirements."

The first of said three paragraphs narrates evidence contained in appellant's Exhibit 134, in so far as the same relates to the situation which would have resulted if the Railroad Commission had established a 50¢ toll suggested by one of the witnesses. *However, the Commission did not establish that toll and there is nothing in said first paragraph which bears on the effect of the tolls actually established by the Commission.* Furthermore, this paragraph merely refers to *testimony* of one witness and there is nothing whatever in the paragraph in the nature of a *finding* of fact by the Commission.

Paragraph two says that "the results estimated for the 1938 revenue *should* produce a return of approximately 7.5% on the *investment* in the bridge structure" but there is nothing to show the basis of any estimate and there is no finding here or elsewhere of any figure which represents the "fair value" or even a proper "rate base". Neither the words "fair value" nor "rate base" are even used in the decision. And even as to "investment", the Commission nowhere analyzes the testimony of the various witnesses on that

subject and then sets down a figure which it finds a fact, to be the investment.

And nowhere does the Commission set down a figures to show what *gross revenues* are estimated it for the year 1938 or any other year from the to established by the Commission, nor what will be t estimated *operating expenses,* including allowan for depreciation and taxes, nor what will be the *amount* remaining for *return* on some undisclos "fair value" or "rate base".

Finally, not a single figure appears from which th Court or any one else can reach a conclusion or ev an estimate that the tolls fixed by the Commission w yield in 1938 or at any other time a return of 7.5 on an unascertained "investment" or any oth figure.

In paragraph three, the Commission expresses i "opinion" that a toll of 45¢ per car and of 5¢ for ea passenger "should be authorized" for operations ov the Carquinez Bridge but none of the missing bas and essential findings appears in support of sa "opinion".

In said paragraph, the Commission finally e presses the hope that such rate "should enable t company to meet its requirements under its trust i denture and amortization and dividend requirement but no *fact* is stated in support of such hope: nor there even a whispered suggestion that such a retu would constitute, as a matter of fact, a "fair retu on the fair value of the property".

Said three paragraphs constitute all there is in the decision as to the actual making of the rate for 1938 or any subsequent year.

1. No finding as to fair value or rate base.

We now draw specific attention to the fact that nowhere in said decision does any figure appear which the Commission finds to be the fair value of the property or the proper rate base.

In fact, counsel for the Railroad Commission conceded that such is the case when in brief filed with the Supreme Court of California, they said (R. 167):

> *"The Commission in its opinion did not make an exact finding of value."*

While the Supreme Court of California stated that "the Commission adopted the original cost, namely, \$7,949,954, as the reasonable rate base" (96 Cal. Dec. 367, 377, 378; R. 134), this is merely an "implication" resulting from a "guess" based on the contention of counsel in an effort to show that the Commission may be assumed to have made a finding which it did not, in fact, make. A careful reading of the Commission's decision will show that nowhere did the Commission find, as a *fact* (as distinguished from a mere recital of evidence) that said or any figure is the "investment" in the property. Even if some figure had been set down by the Commission to constitute, as a *fact*, the investment, there would still remain the further hurdle of what was the "fair value" or a "proper rate base". The Commission did not even attempt to clear that hurdle.

In this respect, as well as in others, the case diffe from *Railroad Commission of California v. Paci Gas & Electric Co.,* 302 U. S. 388. In that case, repl ing to a contention that the Commission had failed find the fair value of the respondent's property, th Court said (p. 400):

> "The Commission specifically found what considered to be the rate base. 39 Cal. R. Com p. 76. The Commission found that rate base to b reasonable. Id. p. 77, note. The import of it opinion is that the rate base represented the Com mission's conclusion as to the value which shoul be placed upon respondent's property for th purpose of fixing rates."

Turning to 39 Cal. R. Com., p. 76, we find that th Commission there said that "the following results ar accepted as reasonable". Among these results, th Commission found the following:

> "Rate base—$105,000,000."

There is no such figure in our case. Nor, as we hav pointed out, does the Commission even attempt make a finding as to either "fair value" or "ra base" or even once use either of said expressions.

Nor will this Court, by *inference* or *guess* supp the basic and essential finding which the Railroa Commission failed to make.

In *Panama Refining Co. v. Ryan,* 293 U. S. 38 this Court, speaking through Mr. Chief Justi Hughes, quoted, with approval, from *Wichita Ra*

road & *Light Co. v. Public Utilities Commission,* 260 U. S. 48, 59, as follows (p. 433):

"It is pressed upon us that *the lack of an express finding may be supplied by implication* and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this."

Continuing, this Court said (p. 433):

"Referring to the ruling in the *Wichita* case, the Court said in *Mahler v. Eby,* 264 U. S. 32, 44: 'We held that the order in that case made after a hearing and ordering a reduction was *void for lack of the express finding* in the order. We put this conclusion not only on the language of the statute but *also on general principles of constitutional government.*"

In *United States v. Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 294 U. S. 499, this Court found that the Interstate Commerce Commission had failed to make the necessary findings to support an order. Speaking through Mr. Justice Cardozo, this Court said (p. 510):

"In the end we are left to spell out, to argue, *to choose between conflicting inferences.* Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co. v. United States,* 282 U. S. 74, 86; *Florida v. United States,* 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

Likewise, in *Atchison, Topeka & Santa Fe Railw Co. v. United States,* supra, as we have already point out, this Court held (p. 202):

"Recently this Court has repelled the suggesti that lack of express finding by an administrati agency may be supplied by implication." (Citi cases.)

b. No finding as to gross revenue, operating and maintenance expen taxes, depreciation, depletion or any other basic and essential r making factor.

Merely to complete the picture, we now invite t Court's attention to the fact that the Commission decision also fails to make any of the following fu ther "basic or essential findings" required to suppo the Commission's order in a case involving the fixi of the rates or tolls of a public utility:

1. While the order purports to establish rate for 1938, there is no finding as to what gro revenue the rate established by the Commissi will produce in 1938 or in any subsequent year;

2. There is no finding as to the reasonab amount of maintenance and operating expens and taxes to be paid in 1938 or in any subseque year;

3. There is no finding as to a reasonable a proper allowance for depreciation or depleti in 1938 or in any subsequent year;

4. There is no finding as to how many doll will remain in 1938 or in any subsequent year f return on the fair value of the property;

5. There is nothing whatever in the decision to show that the rates established by the Commission will yield even a return of 7.5 per cent on the fair value of the property. The entire matter is left to speculation and conjecture and this court is called upon, in the absence of any findings by the Commission, to do the fact-finding work which it was the Commission's duty to do.

At page 380 of its decision (96 Cal. Dec. 367, 380; R. 139), the Supreme Court of California said:

> "The petitioner claims that the Commission erred in *computing* the net revenue upon which it estimated the percentage of return."

This statement is erroneous. Appellant is unable to find from the Commission's decision that the Commission made any computation as to net revenue for 1938 or any subsequent year. To ascertain *net* revenue, it is necessary (a) to ascertain *gross* revenue and then (b) to deduct therefrom operating and maintenance expenses, taxes, depreciation and here also depletion. Upon examination of the Commission's decision, the Court will find that it does not contain a finding of fact as to any of these factors for 1938 or any subsequent year at the rates established by the Commission. Without these *facts* a computation is impossible.

As the Railroad Commission completely failed to make findings on the fair value or any rate base and to make the other necessary basic and essential findings, we submit, very respectfully, that on this ground alone the decision of the Supreme Court of California should be reversed.

C. THE PROCEDURE OF THE RAILROAD COMMISSION CO
TUTED A DENIAL OF DUE PROCESS OF LAW BEC
THE COMMISSION FAILED TO FOLLOW THE RATE-MA
RULE OR STANDARD PRESCRIBED BY THE LEGISLA
OF CALIFORNIA FOR APPLICATION TO TOLL-BRIDGE
PANIES.

1. **Sections 2845 and 2846, Political Code, have never been repe If their language is the language of regulation as distingui from the language of contract, said Sections contain the rate- ing rule or standard which is at this time applicable to toll br companies.**

As we have hereinbefore pointed out, we are vinced that the language of Sections 2845 and 284 the Political Code is the language of contract and the language of regulation. If this is so, that ends appeal in our favor.

On the other hand, if said language be held t the language of regulation, establishing a rate-ma rule or standard which the Legislature can chang any time, we come to the question whether or not Legislature has actually changed that rule or st ard, in so far as toll bridge companies are concer Has the Legislature conferred on the Railroad C mission authority to regulate the rates of toll br companies regardless of the provisions of said tions 2845 and 2846?

Here we are squarely confronted with the ques as to what the Legislature actually did in 1937.

It will be conceded that, prior to the effective of the Act of July 1, 1937 (St. 1937, ch. 896, p. 2 see also Appendix No. 2), the Railroad Commis

had no jurisdiction whatever over toll bridge corporations. It will likewise be conceded that there is no other statute undertaking to confer any such authority upon the Railroad Commission.

What did the Legislature actually do in 1937?

The Legislature, in said Act (p. 2478), merely amended Section 2 (dd) of the Public Utilities Act so as to provide that the term "public utility", when used in the Act, should include every "toll bridge corporation" and added to said Section 2 a new subsection numbered (ee) defining the term "toll-bridge corporation" as used in the Act.

That is all. The Legislature did nothing more. It merely defined toll bridge corporations and provided that they should be classed as public utilities.

Turning now to what the Legislature did *not* do, we find the situation to be as follows:

(1) The Legislature did not repeal or amend Section 2845 or Section 2846 of the Political Code. The situation with reference to the fixing of the rates charged by toll bridge corporations was left just where the Legislature found it, except that the Railroad Commission was substituted for the boards of supervisors as the rate-making authority in connection with toll bridge corporations. In stepping into the shoes of boards of supervisors in that respect, *the Railroad Commission,* of course, *took its new responsibility subject to the existing limitations unless it could be shown, which is not the fact, that those limitations had been repealed.*

It is true that Section 13 (a) of the Public Utili
Act provides that all charges made by any pu
utility "shall be just and reasonable" (St. 1915,
91, pp. 115, 122). However, this is a provision o
general character applicable to public utilities
general. On the other hand, said Sections 2845 a
2846 contain *specific* provisions applicable to
specific classes of public utilities only, namely,
bridges and public ferries. That the *specific* toll p
visions of said Sections 2845 and 2846 applicable o
to toll bridges and public ferries must prevail o
the *general* provisions of Section 13(a) of the Pub
Utilities Act relating to public utilities in *gene*
would seem to be elementary. As to toll bridges a
public ferries, the Legislature set up in said Secti
2845 and 2846 a definite standard of just and reas
able tolls and that standard must prevail, as long a
is unrepealed, over the general standard of just
and reasonableness referred to in said Section 13(
of the Public Utilities Act.

The failure of the Legislature to amend or rep
said Sections 2845 and 2846 of the Political C
when it merely declared, in 1937, that toll bridge c
porations should be public utilities, shows a clear
tention that the Railroad Commission, in stepp
into the shoes of the boards of supervisors as to
bridge corporations, must follow the standard as
just and reasonable rates established as to toll bri
corporations and ferries by said Sections 2845 a
2846 and must comply with the unrepealed rate-m
ing limitations in said Sections 2845 and 2846, eve

those limitations be regarded as words of regulation as distinguished from words of contract.

(2) It is important to bear in mind that the Legislature had consistently shown that the preservation of rights under toll bridge franchises was a matter of concern to it. . .

As we have hereinbefore shown, the Legislature in 1923 amended Section 2872 of the Political Code so as to ratify expressly all franchises granted subsequent to March 14, 1881, for the construction of toll bridges across straits, streams or creeks within the territory in which the Carquinez and Antioch Bridges are located (St. 1923, ch. 131, p. 272).

Also, when in 1929 the Legislature passed the Act of June 10, 1929, granting to the Department of Public Works the exclusive jurisdiction thereafter to grant franchises for the construction of toll bridges and toll roads, the Legislature was careful to provide that the statute should not apply to any persons or corporations holding existing toll bridge franchises (St. 1929, ch. 764, p. 1502, sec. 8).

When, on the same day, the Legislature enacted another statute repealing the Act of March 14, 1881, providing for the construction of toll bridges across navigable streams, it expressly provided that all rights then existing under any valid franchise theretofore granted under the repealed Act, should "continue in full force and effect" (St. 1929, ch. 765, p. 1504, sec. 2).

Also, when in 1933 the Legislature further ferred upon the Department of Public Works a j diction as to toll *ferries* similar to that conferr 1929 as to toll *bridges,* the Legislature was again ful to provide that the Act should not be constru apply to any persons or corporations holding f chises for or operating either toll bridges or toll ries (St. 1933, ch. 7, p. 13, sec. 7).

If it had been the intention of the Legislatur 1937 to change its theretofore consistent polic protecting the rights of the holders of toll br franchises, it may be assumed that the Legisla would have expressly declared that intention. Su declaration would appear to have been all the m necessary in view of the Legislature's consis policy throughout the preceding seventy-five years protecting the rights of the grantees of toll br franchises.

(3) In California, toll bridge regulations h always been in a class by themselves.

As the Supreme Court of California said in M *som v. Board of Supervisors of Contra Costa Co* 205 Cal. 262, 266:

> "In other words, toll-bridge regulations h been from the early history of the state and are in a class by themselves."

As we have shown, the Legislature in 1937 left regulations where it found them "in a class by th selves", merely putting the Railroad Commission the shoes of the boards of supervisors *as the making agency.*

2. If the language of said Sections 2845 and 2846 is the language of regulation, it was the duty of the Railroad Commission to apply the presently effective rate-making rule of said Sections to the tolls of the Carquinez Bridge.

Irrespective of what the Legislature *might* have done, it seems clear that it did not, in fact, give the Railroad Commission authority to disregard the rate limitations contained in Sections 2845 and 2846 of the Political Code, even if said limitations be regarded as being solely regulatory in character and hence subject to amendment or repeal by the Legislature at any time regardless of the effect on holders of toll bridge franchises.

We are satisfied that the rate limitation provisions of Sections 2845 and 2846 of the Political Code on which we rely are *contractual* in character. We believe that the legislative history as well as the language itself and the reason of the thing lead inevitably to this conclusion. However, out of an excess of caution and not because we believe such to be the fact, we have given consideration to the matter on the assumption that said provisions are *regulatory* in character and can be changed, at will, by the Legislature.

However, on this latter assumption, we have shown that, irrespective of what the Legislature *might* have done in 1937, it did not, in fact, confer upon the Railroad Commission the right to disregard said provisions. In the exercise of its rate-making power over toll bridge corporations, standing in the shoes of the Board of Supervisors of the County of Contra Costa, the *Railroad Commission is bound by the unrepealed*

provisions of Sections 2845 and 2846 of the Politi[cal] Code, both if such provisions are regarded as pure[ly] *regulatory* and if they be regarded, as we claim, [as] *contractual* in character.

In either event, we very respectfully submit tha[t] the Railroad Commission could not, as it attempted t[o] do, lawfully fix the tolls of American Toll Bridg[e] Company in disregard of said provisions.

3. Failure of the Railroad Commission to apply the rate-maki[ng] rule of Sections 2845 and 2846 of the Political Code to the tol[ls] of the Carquinez Bridge constituted a denial of procedural du[e] process of law.

The failure of an administrative tribunal charge[d] with the duty of regulating rates of a public utility t[o] follow the rule of rate-making established for tha[t] purpose by the Legislature is clearly a denial of pro[-]cedural due process of law.

The utility has the right to have such rule applied. Failure to do so is obviously a denial of the rights o[f] the utility under Section 1 of Article XIV of th[e] Amendments to the Constitution of the United States.

a. Where the Legislature has prescribed a rule or standard of ra[te] making, it is the duty of the rate-making authority to follow su[ch] rule or standard.

In *St. Louis & O'Fallon Railway Company v. Unite[d] States*, 279 U. S. 461, the plaintiff railway companie[s] brought suit to set aside an order of the Interstat[e] Commerce Commission directing that certain payment[s] be made under the recapture provisions of the Trans[-]portation Act of 1920. This Court held that the Com[-]

mission's order should have been annulled for the reason that the Commission failed to follow the standard set by Congress to be used by the Commission in determining fair value.

This Court, speaking through Mr. Justice McReynolds, held that such legislative standards must be followed by administrative tribunals and, in this connection, said (p. 487):

"But Congress has directed that values shall be fixed upon a consideration of present costs along with all other pertinent facts; and this mandate must be obeyed.

"It was deemed unnecessary by the court below to determine whether the Commission obeyed the statutory direction touching valuations, since the order permitted The O'Fallon to retain an income great enough to negative any suggestion of actual confiscation. With this we cannot agree. Whether the Commission acted as directed by Congress was the fundamental question presented. If it did not, the action taken, being beyond the authority granted, was invalid."

In *Louisville and Nashville Railroad Company v. Garrett*, 231 U. S. 298, suit was brought by the Railroad Company to enjoin the enforcement of a rate order and a reparation order made by the Railroad Commission of Kentucky.

Referring to the questions to be considered by the courts in such rate-making cases, this Court, speaking through Mr. Justice Hughes, said that the first question to be considered would be "*whether the Commis-*

sion acted within the authority duly conferred by the legislature" (p. 313).

In *Wichita Railroad & Light Company v. Public Utilities Commission of Kansas*, 260 U. S. 48, the Light Company filed a bill for an injunction to enjoin the Public Utilities Commission of Kansas from making effective certain rates for electric energy. This Court held that the Commission's order was void on its face.

At page 58, the Court, speaking through Mr. Chief Justice Taft, said:

> "The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function."

Continuing, the Court said (p. 59):

> *"It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action."*

In *Mahler v. Eby*, 264 U. S. 32, certain persons who had been seized on deportation warrants of the Secre-

tary of Labor sued out writs of habeas corpus. This Court held that the warrants were defective for the reason that the Secretary had failed to make a finding that the petitioners were "undesirable citizens", as required by the statute.

At page 44, referring to *Wichita R. R. & Light Co. v. Public Utilities Commission*, 260 U. S. 48, the Court said:

"We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute *but also on general principles of constitutional government.*"

In *Panama Refining Co. v. Ryan*, 293 U. S. 388, this Court, at pages 432-3, quoted, with approval, from both *Wichita Railroad & Light Co. v. Public Utilities Commission*, supra, and *Mahler v. Eby*, supra.

4. Failure of the rate-making authority to follow the legislative rule or standard of rate-making is arbitrary action which constitutes denial of procedural due process of law.

Where a public utilities commission, exercising the legislative function of rate-making, disregards the standard which the Legislature has established for such rate-fixing, it would seem too clear for argument that the commission has acted *arbitrarily* and, consequently, has denied to the utility due process of law.

In the following cases, among others, this Court held that when the rate-making tribunal acts *arbitrarily*, such action constitutes denial of procedural due

process of law "and comes under the Constitution's condemnation of all arbitrary exercise of power".

Interstate Commerce Commission v. Louisville and Nashville Railroad Company, 227 U. S. 88, 91;

Northern Pacific Railway Company v. Department of Public Works of the State of Washington, 268 U. S. 39, 44-5;

Chicago, Milwaukee & St. Paul Railway Company v. Public Utilities Commission of the State of Idaho, 274 U. S. 344, 352.

In *Panama Refining Co. v. Ryan,* 293 U. S. 388, the general rule that an administrative board or commission must act within the delegated authority and that if it does not do so its action constitutes denial of due process of law is thus stated by the Court, speaking through Mr. Chief Justice Hughes (p. 432):

> "If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or *of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission* * * * "

Applying the general rule to the specific facts of a rate order made by a State public service commission, this Court, in *West v. Chesapeake & Potomac Telephone Company of Baltimore,* 295 U. S. 662, speaking through Mr. Justice Roberts, said (p. 679):

> *"We have shown that the Commission's order violates the principle of due process, as the measure of value adopted is inadmissible."*

As the rate-making rule or standard specified by Sections 2845 and 2846 of the Political Code of California for application to toll bridge companies has never been repealed and was fully effective at the time when the Railroad Commission made the order under review herein, and as the Commission failed and refused to apply said standard or rule, we submit, very respectfully, that said action by the Railroad Commission constituted a denial of procedural due process of law and that, for this reason alone, the judgment of the Supreme Court of California should be reversed, even if it be held that the language of said Sections 2845 and 2846 of the Political Code is the language of regulation and not the language of contract.

D. EXCLUSION OF ANTIOCH BRIDGE. THE PROCEDURE OF THE RAILROAD COMMISSION CONSTITUTED A DENIAL OF DUE PROCESS OF LAW BECAUSE THE COMMISSION UNFAIRLY, UNJUSTLY AND ARBITRARILY SEVERED THE ANTIOCH BRIDGE FROM APPELLANT'S SINGLE, UNIFIED TRANSPORTATION SYSTEM AND FIXED TOLLS FOR THE CARQUINEZ BRIDGE ALONE, NOTWITHSTANDING THE FACT THAT THE RECORD SHOWS, WITHOUT DISPUTE, THAT THE INEVITABLE EFFECT OF THE REDUCTION OF TOLLS ON THE CARQUINEZ BRIDGE WOULD, BY FORCE OF COMPETITION BETWEEN THE TWO BRIDGES, COMPEL APPELLANT TO MAKE SIMILAR REDUCTIONS IN THE TOLLS CHARGED ON THE ANTIOCH BRIDGE, A LOSING VENTURE, THUS ACCOMPLISHING BY INDIRECTION A RESULT WHICH THE RAILROAD COMMISSION COULD NOT ACCOMPLISH DIRECTLY.

The result has been that the Commission cut the Carquinez Bridge tolls deeper than it could otherwise

have done, if at all, relying on the force of competition to pull the tolls of the Antioch Bridge down to those thus fixed for the Carquinez Bridge. That such action denied to appellant "the rudimentary requirements of fair play" (*Morgan v. U. S.*, 304 U. S. 1, 15) seems very clear.

We shall now develop the facts and then consider the authorities.

1. Company's motion and Commission's decision.

On August 27, 1937, the Railroad Commission, on its own motion, in Case No. 4244, instituted an investigation into the rates, rules and regulations of American Toll Bridge Company, San Francisco Bay Toll Bridge Company and Dumbarton Bridge Co., owning and operating toll bridges across the waters of San Francisco Bay (R. 27).

The order specifically mentioned *both* the *Carquinez* and the *Antioch Bridges* of American Toll Bridge Company.

Thereafter, on October 4, 1937, after the Commission's experts had been examining the Company's books for approximately a month and, presumably, had ascertained the financial situation of the Company with reference to both the Carquinez and the Antioch Bridges, the Commission, in Case No. 4259, instituted another investigation into the rates, charges, contracts, classifications, rules and regulations of American Toll Bridge Company alone and *confined to the operation of the Carquinez Bridge* (R. 30).

It was in the latter case that the decision and order erein under review were made.

The initial hearing in both cases was held on Octo-er 26, 1937. At that time, counsel for American Toll Bridge Company made a formal motion to consolidate Cases 4244 and 4259 for hearing and decision, in so ar as American Toll Bridge Company is concerned, so that the Commission would make its ruling on the rates, rules and regulations to be charged for transportation over *both* the Carquinez and the Antioch Bridges (R. 204-6).

In support of his motion, counsel pointed out that he Carquinez and the Antioch Bridges are component arts of the single transportation system of Ameri-an Toll Bridge Company; that in so far as their ma-or traffic is concerned the bridges are distinctly *ompetitive;* that the operations of the Antioch ridge have been less satisfactory, financially, than iose of the Carquinez Bridge; that the *competition* tween the two bridges is such that *the inevitable re-lt of establishing reduced rates for the Carquinez ridge would be to force like reduced rates for the ntioch Bridge;* and that a consideration of the rates the Carquinez Bridge alone would work a great justice on American Toll Bridge Company and the vice which it renders (R. 204-6).

The Commission did not then rule on the motion took the same under advisement (R. 207).

The Commission proceeded in Case No. 4259 alone. failure to proceed in Case No. 4244 was empha-

sized by changing the reference on the title page of Exhibit 1 from Case No. 4244 to Case No. 4259 (R. 208).

In its decision, the Commission, without giving any reason for its action, denied said motion. The Commission merely said that "it has been decided" to limit its decision and order to the Carquinez Bridge (R. 33-34).

The decision shows on its face that in determining the tolls to be charged for the transportation of automobiles and passengers over the Carquinez Bridge, the Commission confined its consideration to that bridge alone. The figures referred to in connection with the new tolls relate to the Carquinez Bridge alone (R. 36-38).

The tolls fixed by the Commission are made specifically applicable to the Carquinez Bridge alone (R. 38).

While the decision states (R. 34) that in fixing rates for traffic over the Carquinez Bridge, consideration would be given to the effect of such rates on the Company as a whole, this statement is obviously an inadvertence. The decision contains no figure as to fair value or rate base, or revenues or expenses or return as to the Antioch Bridge and says nothing as to the tolls charged or to be charged on the Antioch Bridge. The Antioch Bridge is purposely excluded from consideration.

The Carquinez and the Antioch Bridges are component parts of the single, unified transportation system of American Toll Bridge Company.

The record herein shows, without any evidence to he contrary, that the Carquinez and the Antioch Bridges are component parts of the single, unified ransportation system of American Toll Bridge ompany.

At page 375 of its decision, the Supreme Court of alifornia said (96 Cal. Dec. 367, 375; R. 131):

> "The fact that the bridges are competitive, together with a consideration of all the other relevant facts appearing, *may* be said to have justified the commission in concluding that they are not integrated into a single transportation system and that neither is used or useful in any service performed by the other."

It is respectfully submitted that this statement is erely *surmise* on the part of the court. The simple ct is that *the Commission made no finding on the bject.* The Commission merely said that "it has en decided to limit this decision and the order rein to Case No. 4259", without any discussion and ithout giving any reason for the conclusion thus ached (R. 33).

The evidence, without any dispute whatever, negaes the court's surmise.

The franchises for both bridges were granted by linances of the Board of Supervisors of Contra sta County to the same financial interests in the st half of 1923. Both franchises are for terms of

twenty-five years and each will expire in the first half of 1948 (R. 209, 226-7).

During all the time that construction work was proceeding on the Antioch Bridge, construction work was also going on on the Carquinez Bridge (R. 339). The Supreme Court of California was in error in stating that appellant *"purchased"* both bridges to reduce competition or at all (96 Cal. Dec. 367, 375; R. 131). The simple fact is that appellant, as owner of both franchises itself *constructed* both bridges as a single venture.

American Toll Bridge Company operates both toll bridges "as one property" (Mitchell, Exh. 3, R. 229, 231).

American Toll Bridge Company has a single set of books for both bridges. No separate set of books is kept for the Carquinez Bridge as distinguished from the Antioch Bridge (Coleman, R. 338).

Numerous single items of assets and liabilities are applicable to both the Carquinez and the Antioch Bridges. Typical of these items are the Company's capital stock and its bonds. These items were issued against *both* bridges (Coleman, R. 339); see also Statement of Company's Assets and Liabilities, Exh. 1 (R. 209, 212-213, Coleman). In order to determine assets and liabilities properly to be charged against the bridges separately, it would be necessary to make apportionments on more or less arbitrary bases (Coleman, R. 339).

The two bridges are located within twenty-five miles of one another across the same water barrier. Although they are, in certain respects, supplementary to one another, they are, as to the major traffic, distinctly competitive. For a map showing the location of said two bridges, please see frontispiece to this brief; also R. 264A.

In the "Report on Investigation of Carquinez Toll Bridge" dated October 20, 1932, which report State Highway Engineer C. H. Purcell submitted to Earl Lee Kelly, Director of Public Works, and he, in turn, to the Governor of California, advice was given, on page 8, as follows (Mitchell, R. 290):

> "Attention is again called to the fact that the American Toll Bridge Company owns and operates *as one project,* both the Carquinez and Antioch toll bridges, and it is, therefore, necessary to consider the future earning power of the *two* bridges in order to arrive at a reasonable price for which the stockholders of that Company could dispose of the Carquinez Bridge alone."

The Report, at page 37, said (Mitchell, R. 290-1):

> "It must be recognized that those who initiated and developed a project such as these toll bridges are entitled to be rewarded for their foresight and for the risk which they had taken. The public, having held off until the results are more or less assured, must expect to pay for the pioneering of others."

The Report then, at page 38, first estimates the total fair purchase value of *both* bridges, being the

sum of $11,032,140.00 and then, by making cert deductions from the combined value of *both* bridg determines a fair net purchase price of the Carqui Bridge alone, being the sum of $10,288,840 (Mitchell, R. 291-2).

The significant point is that the officials of the St Highway Division and of the Department of Pul Works of the State of California clearly recogni that the two bridges are part and parcel of a sin unified project. Hence, in order to ascertain a f net purchase price of the Carquinez Bridge alone t found it necessary and proper to determine firs fair purchase price for both bridges together.

The record compels the conclusion that the two bridges are component parts of appellant's sin unified transportation system.

3. The Carquinez and the Antioch Bridges are competitive with another and charge the same rates. Hence a reduction in the charged by one of these bridges necessarily forces a simila duction in the tolls charged by the other bridge.

As the Antioch Bridge serves substantially same territory and the same traffic as the Carqu Bridge and is distinctly *competitive* with it, the evitable effect of the Commission's decision, i stands, would be to force the Company to reduce Antioch Bridge tolls to the same level as the quinez Bridge tolls, and thus to still further wea the financial condition of the Company.

The record shows, without any dispute, that Antioch Bridge operated in the red in the years l

1927, 1928, 1933, 1934, 1935 and 1937 (Coleman, R. 341).

The statement in the decision of the Supreme Court of California (96 Cal. Dec. 367, 376; R. 132-3) that

> "the petitioner is not entitled to have the investment and operating expense of both bridges included in the rate base upon which to compute a toll for the Carquinez bridge,"

is a misstatement of this appellant's position. We have never taken such a position. What we have urged and believe to be the only fair thing to do, is that the fair value, revenues and expenses of both bridges be considered together for the purpose of fixing tolls for *both* bridges, not for the Carquinez Bridge alone.

Unless appellant is correct in its position as to the impairment of contract obligations, the fair and lawful thing to have done would have been for the Commission to have considered the entire transportation properties of appellant, consisting of *both* bridges, and to have established rates which would have yielded a fair return on the fair value of the entire property of the appellant devoted to the service of transportation.

4. The Commission's exclusion of the Antioch Bridge was unfair, unjust and arbitrary and constituted a denial of procedural due process of law.

As we have already shown, an order of an administrative tribunal which is unjust, unreasonable and arbitrary constitutes denial of procedural due process

of law, even though the order is in form within the limits of the delegated power.

> *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541, 547;
>
> *State of Washington ex rel. Oregon Railroad and Navigation Company v. Fairchild*, 224 U. S. 510, 524;
>
> *Great Northern Railway Company v. State of Minnesota*, 238 U. S. 340, 345;
>
> *Northern Pacific Railway Company v. Department of Public Works of the State of Washington*, 268 U. S. 39, 45.

In *Coney v. Broad River Power Co.*, 171 So. Car. 377, 172 S. E. 437, the Supreme Court of South Carolina held void an order of the Railroad Commission of South Carolina fixing rates to be charged by Broad River Power Co. for electric energy. The reason for the decision was the exclusion by the Commission from the rate base and from the operating revenues and expenses of the figures relating to the Company's street railway system in the City of Columbia and its environs.

The evidence showed that the operations of the Company's street railway system were much less profitable, financially, than those of its electric system. It was obvious that the Railroad Commission excluded the street railway system so as to be able to fix lower rates for electric energy than would be the case if consideration were given to the Company's entire property, including both its street railway and its electric systems.

In this respect, the case bears a striking analogy to that now before this Court.

The Supreme Court of South Carolina, after reviewing decisions of this Court, found that the Railroad Commission had been in error in excluding said street railway property. On this point, the court said (p. 441):

> "The court finds that it was error to exclude the value of the property and franchise of the Columbia Street Railway, Gas & Electric Company from the base value of the company's properties * * *"

Replying to the argument that the Railroad Commission had "discretion" in fixing the unit for the rate base, the court said (p. 440):

> "Considering, if you please, that the commission has large discretionary power in fixing rates under the authority given it by the act of the General Assembly, nevertheless *its discretion is not an arbitrary one, but is a legal one to be exercised in accordance with the facts in the case as shown by the evidence.*"

The proposition that less than the entire property of a public utility is frequently fixed as the appropriate unit for rate making purposes, is too firmly established to justify the citation of authority. Thus, it would be ridiculous to say that in fixing the rate to be charged for electric energy in a small community by a far-flung electric company it would be neces-

sary to ascertain the value of the company's entire system property.

The determination of the proper rate-making unit is a matter which necessarily rests, in the first instance, in the exercise of a proper discretion by the rate-making authority. But, as was said in the *Coney* case, that

> "discretion is not an arbitrary one, but is a legal one to be exercised in accordance with the facts in the case as shown by the evidence."

However, the fact that in many instances rates are fixed for only a portion of a public utility's system is, in our opinion, no justification whatever for excluding from consideration a portion of the transportation system which is parallel with and almost adjacent to the portion for which rates are to be fixed and which, by reason of the *competitive* situation will be immediately, directly and seriously affected by the rates established for the neighboring portion of the same transportation system.

In such a case, "the rudimentary requirements of fair play" as well as proper rate making principles, require that the problem be considered *as a whole.*

In ruling against appellant herein on the issue of the exclusion of the Antioch Bridge, the Supreme Court of California (96 Cal. Dec. 367, 375-6; R. 132) cited *Wabash Valley Electric Co. v. Young,* 287 U. S. 488, *Gilchrist v. Interborough Rapid Transit Company,* 279 U. S. 159 and *International Railway Co.*

v. Prendergast, 1 Fed. Supp. 623, but none of these cases support the court's conclusion.

In *Wabash Valley Electric Co. v. Young,* 287 U. S. 488, citizens of the City of Martinsville and the City itself joined in an application to the Public Service Commission of Indiana asking that existing rates for electric energy be reduced. The Commission thereafter made its order reducing said rates. The principal issue before this Court was whether or not the electric utility's entire operating property, covering thirteen counties and fifty cities and towns in Indiana, should have been taken as the unit in fixing the rate base (pp. 493, 495).

The evidence showed that the electric system in the City of Martinsville was originally built and operated as a separate and complete plant to serve that City alone; that it later became part of the larger production and transmission system of Wabash Valley Electric Co.; that the electric utility had filed with the Indiana Commission a schedule of rates applicable to the City of Martinsville alone; that prior to the acquisition of the property by Wabash Valley Electric Co. it had always been a distinct and separate unit for the purpose of fixing rates; and that the Indiana statutes required that the municipality be treated as a separate unit (pp. 493-7).

Furthermore, this is a case in which there was *no competitive feature whatever* between separate portions of a single unified public utility system. There was no competition between the electric system in

Martinsville and the electric system in any adjacent city or other territory.

Thus, the facts of that case are entirely different from the facts of the present case. The *Wabash Valley Electric Co.* case is a good illustration of a case involving the very factors which do *not* exist in the present case.

In *Gilchrist v. Interborough Rapid Transit Company,* 279 U. S. 159, the question at issue was whether or not the Transit Commission of the City of New York had jurisdiction to authorize an increase of the existing street car fares in the City of New York from 5¢ to 7¢. On the question whether the elevated and the subway operations could be treated separately or whether they should be considered as a single rate making unit, an affidavit filed by the City of New York contained, among others, the following allegations (p. 200):

> "The elevated and subway operations have been kept financially distinct. The revenues, expenses, taxes and fixed charges have been segregated, so that each system has had its own financial set-up under the contract controlling its operation."

Furthermore, it appeared that Interborough Rapid Transit Company had itself treated the two systems as being distinct and separate for rate making purposes when, on May 28, 1920, it filed an application with the Transit Commission for authority to charge a higher fare than 5¢ *on the subways alone,* without asking any relief at that time as to the elevated lines (p. 206).

On that state of facts, this Court, speaking through Mr. Justice McReynolds, properly pointed out that "the two systems have been treated as separate and upon this record must be so regarded" (pp. 209-10).

However, in the case now before this Court, the Carquinez and the Antioch Bridges have always been operated as a single property under a single financial set-up, the tolls have always been the same on both bridges and both bridges have uniformly been treated by the Company as a unit in respect to tolls.

In *International Railway Co. v. Prendergast*, 1 Fed. Suppl. 623, the question at issue was whether or not the street railway fares in the City of Buffalo were confiscatory. The Company urged that the Public Service Commission should have included in the rate base street railway systems in other cities and two international bridges across Niagara Falls. The court very properly pointed out that with the acquiescence of the Company the Public Service Commission had theretofore treated the Buffalo street railway portion of the system as a separate unit of operation. Quite naturally, the Company's position was held to be untenable.

The case is, of course, quite different on its facts from that now before this Court. There was *no showing of any competitive situation* between the street railway system in Buffalo and the Company's other properties. Nor did the street railway properties in the other cities or the two international bridges serve the same territory or any part thereof as the street rail-

way system in the City of Buffalo. The *International Railway Co.* case was not a case in which the reduction of the rates of a public utility on one part of its system would have the inevitable effect, by reason of the play of competitive forces, of compelling the public utility to make a similar reduction in the rates on a parallel portion of a single, unified transportation system.

On the other hand, *Clarksburg-Columbus Short Route Bridge Co. v. Woodring and Parkersburg-Community Bridge Company*, 89 Fed. (2d) 788, decided on Feb. 1, 1937, presented the situation of *two competitive toll bridges* each crossing the Ohio River. The one, owned by the Parkersburg Company, was located between Parkersburg, West Virginia, and Belpre, Ohio. The other, owned by the Clarksburg Company, was located between St. Mary's, West Virginia, and Newport, Ohio. The distance between the bridges was twenty miles. These two bridges were competitive and their toll rates were approximately the same (p. 789), just as is the case with the Carquinez and the Antioch Bridges. Both bridges were subject to the authority of the Secretary of War to prescribe their toll rates (p. 790).

The Secretary of War reduced the toll rates to be charged by the Parkersburg Company, without giving notice to the Clarksburg Company or considering any of the facts relating to that Company. The Clarksburg Company filed its bill for injunction against the Secretary and the Parkersburg Company. The District

Court granted the Secretary's motion to dismiss. The decree was reversed by the United States Court of Appeals for the District of Columbia in an opinion by Associate Justice Van Orsdel.

At page 791, the court said:

> "In the present situation, considering the sharp competitive conditions existing between the two companies here involved, it was impossible for the Secretary to arrive at a decision fixing 'just and reasonable' tolls in the absence of complete and full testimony as to all the conditions bearing upon the rights of these respective parties. As suggested, the procedure is judicial and all the attributes of a judicial proceeding should be observed in order to arrive at a just and equitable conclusion."

In conclusion, the court said (p. 794):

> "We think the lower court was in error in holding that the Secretary was not required to consider the effect of the new rates 'upon another bridge 20 miles distant'. This loses sight of the fact that these two bridges are integral parts of a single transcontinental highway, the branches thereof dividing east of the bridges and converging again west of the bridges, thus dividing the traffic, as the public may find convenient, between the two bridges in question. It is difficult to imagine a case where a rate reduction on one instrumentality of commerce more directly affects another than in the case here presented.
>
> "The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion."

This Court subsequently held that the cause had become moot (*Woodring v. Clarksburg-Columbus Short Route Bridge Company*, 302 U. S. 658), but no criticism was made of Justice Van Orsdel's reasoning.

That reasoning is, we submit, all the more applicable where the two competitive toll bridges are owned by one and the same company. In such a case, we believe it most unfair and arbitrary for the rate-fixing tribunal to consider only the situation of the more profitable of the two competitive bridges and thus to fix a rate *lower* than could possibly be done if the rate-making facts as to *both* bridges were considered and a toll established for *both* bridges.

We respectfully submit that the Railroad Commission could not properly justify the exclusion of the Antioch Bridge by reliance on any "discretion" but that it should have proceeded with its original investigation, in so far as American Toll Bridge Company is concerned, and should have fixed the tolls to be charged by both the Carquinez and the Antioch Bridges and that its action in fixing tolls for the Carquinez Bridge alone, exclusive of the Antioch Bridge, was unjust, unreasonable and arbitrary and constituted a denial to appellant herein of procedural due process of law.

E. CONCLUSION ON DENIAL OF PROCEDURAL DUE PROCESS

If the Court finds it necessary in this appeal to look beyond the question of impairment of contract obligations, and turns next to the questions under the head of "procedural due process", we believe that the

Court will find that for each of the reasons specified under subheads A, B, C and D hereof the procedure of the Railroad Commission constituted a denial of procedural due process of law.

And we respectfully submit that if said specifications are viewed together, as a whole, the conclusion is inescapable that the procedure of the Railroad Commission deprived appellant of procedural due process of law in violation of the provisions of Section 1 of Article XIV to the Amendments of the Constitution of the United States.

III.

DUE PROCESS—CONFISCATION.

A. THE RAILROAD COMMISSION'S ORDER CONFISCATED APPELLANT'S PROPERTY IN THE CARQUINEZ BRIDGE BECAUSE IT FAILED TO ACCORD A FAIR RETURN ON FAIR VALUE.

1. Rate base.

a. Book cost.

The book cost of the physical items of the property, together with overheads, as recorded on the Company's records, was shown to have been $7,949,954.02 (Exh. 117—Ready and Gerwick—R. 410, 411, col. 1).

This figure can also be deduced from Exhibit 1, presented by Mr. Coleman of the Railroad Commission's staff. Mr. Coleman reported that the cost of the physical items, together with overheads, as recorded on the Company's books, was $7,863,451.17 (R. 209, 214). However, this sum does not include the cost

of lands or of furniture and fixtures, which items are shown in Exhibit 117, Gerwick and Ready, to have been as follows (R. 410, 411).

Lands	$66,834.62
Furniture and fixtures	$19,668.23

The addition of these omitted items to Mr. Coleman's said figure of $7,863,451.17 gives said total book cost of $7,949,954.02.

Accordingly, it appears that there is no dispute in the record as to the original cost, as recorded on the books, of the physical items which entered into the construction of the Carquinez Bridge, plus the applicable overheads.

However, as will appear, said figure contains only a partial allowance for proper interest during construction and also contains no allowance for the cost of developing the business, or going concern value.

b. Reasonable historical cost.

Mr. Ready and Mr. Gerwick reported that the reasonable historical cost of the physical items of the property, including overheads, but not including any allowance for cost of developing the business, would have been $8,139,307.84 (Exh. 117, R. 410, 411, col. 3). There was practically no cross-examination as to this figure and it may be accepted as a correct estimate.

c. Reproduction cost new—1937.

Exh. 118 is an estimate by Mr. Ready and Mr. Gerwick of the cost to reproduce new, as of 1937, the

physical items of the Carquinez Bridge, together with the necessary overheads. The total estimate is $8,743,-231.14 (R. 415, 416).

None of the above figures contain any allowance for the cost of developing the business, or going concern value, to which item more specific reference will hereinafter be made.

Mr. Stewart Mitchell, testifying for the Railroad Commission, first submitted in Exhibit 3 (R. 229, 245) an estimate of what it should reasonably have cost to construct the physical items of the Carquinez Bridge, together with overheads, the total sum being $6,186,-071.00. The witness later raised this sum to $6,877,-318.00 (Exh. 16, R. 247, 257, col. 2). The testimony of this witness was so thoroughly discredited by his lack of training and experience, by innumerable omissions of important items, by underestimates of costs, and by hypothetical and impossible assumptions underlying his estimates (Mitchell, cross-examination, R. 293-334; Derleth, R. 366, 368-9, 371-7, 379-80, 382-4, 386, 388, 390, 392-401; Coleman, R. 336-8; McAllister, R. 447-9), that his estimates will not be further herein referred to except in connection with certain specific items. It is significant that there is nothing in the Railroad Commission's decision to indicate that the Commission gave any consideration to the estimates of this witness.

d. **Value of investment—1929.**

In report entitled "Investigation and Report on Toll Bridges in the State of California", prepared

by the California Highway Commission for the members of the State Legislature and dated January 23, 1929, the Highway Commission reported, page 67, that the value of the investment in the Carquinez Bridge at that time was $10,676,142.00 (Mitchell, R. 288).

e. **Fair purchase price—1932.**

In "Report on Investigation of Carquinez Toll Bridge" submitted by Mr. C. H. Purcell, State Highway Engineer, to Mr. Earl Lee Kelly, Director of Public Works, on October 21, 1932, and on the same date by Mr. Kelly to Governor Rolph, the State Highway Engineer and the Director of Public Works reported (p. 38) that a net fair purchase price of the Carquinez Bridge at that time would be $10,288,840.00 (Mitchell, R. 292).

f. **Railroad Commission's failure to make any finding as to fair value or rate base.**

As we have already shown, the Railroad Commission failed to make any finding as to any number of dollars as being either the fair value of the Carquinez Bridge or a proper rate base.

This failure makes it very difficult for either court or counsel to proceed to determine whether or not the rates fixed by the Commission will confiscate appellant's property in the Carquinez Bridge. This is a task which, by reason of the Commission's said failure, is most difficult for counsel and which the Court should not be called upon to perform at all.

Under the circumstances, we have decided to develop a *minimum* rate base by taking the *lowest reliable figure* in the record and merely making two necessary additions thereto. This *lowest* figure is the agreed book cost of $7,949,954.00, which figure contains only a partial allowance for the important item of interest during construction and makes no allowance whatever for the likewise important item of going concern value.

However, in developing such *minimum* figure, it must be understood that we do not concede that such figure would be adequate as representing the fair value of the property. The statement of the Supreme Court of California to the contrary is inaccurate (96 Cal. Dec. 367, 378; R. 136). The figure which we shall compute is merely a *minimum* figure developed because of the failure of the Railroad Commission to make any finding of fair value or a proper rate base.

g. A minimum figure for fair value or rate base.

Starting, then, with said figure of $7,949,954.00, we proceed to a consideration of the two necessary additions thereto.

(1) Interest during construction.

Said sum of $7,949,954 includes as interest during construction the sum of $688,092.56 and no more (Coleman, Exh. 1, R. 209, 214; Ready, Exh. 117, R. 410, 411, col. 1, item 12).

Said sum of $688,092.56 constitutes interest during construction on only that portion of the construction

capital which the Company secured from the sale of *bonds* in 1925. The sum contains nothing for interest during construction on that part of the construction capital which was secured by the Company from the sale of its *capital stock* or from *any other source* than from the sale of bonds (Ready, R. 521).

The sum of $1,377,522.00 was expended for construction purposes by the Company prior to the time when bond money became available. No interest whatever on this money is included in said sum of $688,092.56 (Ready, R. 521; Exh. 119, separately forwarded, Table 3, cols. 3 and 4).

Because the Company's books show interest in connection with *bond* money alone, the resulting figure of $688,092.56 is materially less than the amount which must be included in a determination of the cost of the bridge for rate making purposes (R. 521).

It is, of course, clear that in determining a proper rate base, interest during construction should be allowed *on all moneys*, from whatever source secured, *which were expended for capital account* during a reasonable construction period.

As the California Railroad Commission itself said in *Application of City of San Diego for Order Establishing Rates to be Charged for Water,* 4 C. R. C. 902, 915:

> "Considerable attention was given at the hearing to the question of interest during construction. It appears that the amount shown for interest on the books of the Southern California Mountain

Water Company represents only interest on borrowed money and that no entry appears on the books to represent interest on money secured through other means, such as the sale of stock. *It is, of course, clear that interest during construction should be allowed on all moneys, from whatever source secured, which were spent for capital account during a reasonable construction period."*

As far as we know, this has been the uniform practice not merely of the California Railroad Commission but also of similar regulatory Commissions in other States.

Addressing ourselves now to the question of what is the amount which should properly be allowed for interest during construction in the present case in connection with the original construction costs, Mr. Mitchell, one of the Commission's own witnesses, admitted that said sum of $688,092.56 is too low in the sum of $415,541.44 and that the correct amount should be $1,103,634.00 (Mitchell, R. 320; Exh. 16, R. 247, 257, col. 2—Mitchell).

Mr. Ready reported the somewhat lower total figure of $1,070,761.00 (Exh. 117, R. 410, 411, col. 2), which figure we believe to be correct and more accurate than the somewhat higher Mitchell figure. We shall hereinafter use Mr. Ready's said figure.

Accordingly, the difference between said figure of $688,092.56 and said figure of $1,070,761.00, namely the sum of $382,668.44 should be added to the sum

of $7,949,954.02 in our search for a *minimum* fair value or rate base, making a corrected figure, thus far, of $8,332,622.46.

Thus far, however, there has been no allowance for going concern value, to which subject we shall now address ourselves.

(2) Going concern value.

In its decisic.., the Railroad Commission did not say that it was valuing the property as a going concern. The decision not even once refers to the subject of going concern value. It is obvious that if the property was valued at all, no allowance was made, in any form or manner whatever, for going concern value.

As a plain bookkeeping fact, said figure of $7,949,-954.00 contains nothing whatever for going concern value.

(a) The principle.

For many years, the leading decision in the United States on the subject of going concern value has been *Des Moines Gas Company v. City of Des Moines*, 238 U. S. 153, in which case, at page 165, this Court, speaking through Mr. Justice Day, said:

> "That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be considered in determining the value of the property, upon which the owner has

a right to make a fair return when the same is privately owned although dedicated to the public use."

Among the most recent decisions is *McCardle v. Indianapolis Water Co.*, 272 U. S. 400. At page 414, this Court, speaking through Mr. Justice Butler, said:

"The decisions of this court declare: 'That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right, and should be consider in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned although dedicated to public use.' *Des Moines Gas Co. v. De Moines*, 238 U. S. 153, 165; *Denver v. Denver Union Water Co.*, 246 U. S. 178, 191, 192. And see *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 865; *Omaha v. Omaha Water Co.*, 218 U. S. 180, 202, 203, and cases cited."

The Supreme Court of California conceded that the Railroad Commission made no allowance for going concern value and sought to justify such failure by reliance on *Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, 292 U. S. 290, *Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio*, 292 U. S. 398 and *Los Angeles Gas & Electric Corporation v. Railroad Commission of California*, 289 U. S. 287 (96 Cal. Dec. 367, 378-9; R. 137-8). However, none of these cases support the California court's conclusion on the facts of the present case.

In *Dayton Power & Light Co. v. Public Utilities Commission of Ohio,* 292 U. S. 290, the decision itself shows very clearly that the Public Utilities Commission of Ohio did make an "allowance of the cost of developing new business" (p. 309). However, the court very properly refused to make a further and additional allowance for "going value". Such additional allowance would, in effect, have been making an allowance twice for the same item.

In *Columbus Gas & Fuel Co. v. Public Utilities Commission of Ohio,* 292 U. S. 398, the allowance claimed for this item by experts testifying in behalf of the Gas Company was "a cost not taken from the books, but merely presumed or estimated at widely variant amounts" (pp. 412-13). The Court found that the estimates submitted by said experts were "so vague as to be little more than guesses" (p. 413).

The Court, of course, held that such estimates should be disregarded. This is very different, however, from saying that a claim based on the actual facts of the company's operations with a full record of the company's receipts and expenditures from the very beginning would not have resulted in an appropriate allowance for the item here claimed by us.

In *Los Angeles Gas & Electric Corporation v. Railroad Commission of California,* 289 U. S. 287, the Court, at page 313, referred with approval to the long line of decisions of this Court relied upon by us and showing the necessity of making allowance for the item of cost of developing the business or going con-

cern value, in the event that there is proper evidence on that subject.

The Court found that the Railroad Commission *did* find a rate base which was sufficiently high to include an allowance of $5,500,000.00 for the item of going concern value and said, with reference to this sum, that "the entire excess (of $5,500.000.00) may be regarded as applicable to whatever intangible value the property had as a going concern" (p. 317).

Continuing, this Court, speaking through Mr. Justice Butler, said (p. 317):

> "The fact that this margin in the rate base was not described as going value is unimportant, if the rate base was in fact large enough to embrace that element."

The issue was not whether some allowance should be made for going concern value but, rather, whether the allowance already actually made should be *increased* in the much larger amounts claimed by the Company. In holding that no such *additional* allowance should be made, the Court held that the testimony of the Company's expert witnesses was "of a highly speculative and uncertain character" (p. 317) and that the testimony consisted of various estimates and assumptions (pp. 317-18).

In deciding that the testimony did not warrant an allowance in excess of the allowance of $5,500,000.00 already made by the Railroad Commission, the Court concluded (p. 319):

> "It is unnecessary to analyze the testimony of these witnesses, as it is obviously *too conjectural*

> to justify us in treating the failure to include their estimates as a sufficient basis for a finding of confiscation."

Before leaving this case, we desire to point out that an allowance of $5,500,000.00 for going concern value constituted 8.4% of the rate base of $65,500,000.00 which the Railroad Commission fixed in that case (p. 319).

Under the decisions of this Court, an appropriate allowance must be made in this case for going concern value. We shall now address ourselves to the question of what that allowance should be.

(b) Usual allowance.

The amount to be added for this item depends, of course, upon the facts of the particular case.

However, an allowance of at least 10% of the cost of reproducing new physical properties is quite customary, particularly in the more recent decisions.

In *McCardle v Indianapolis Water Co.*, 272 U. S. 400, this Court said, on this point (p. 415):

> "The evidence is more than sufficient to sustain 9.5% for going value. And the reported cases showing amounts generally included by commissions and courts to cover intangible elements of value indicate that 10.0% of the value of the physical elements would be low when the impressive facts reported by the commission in this case are taken into account. (Citing numerous decisions of the Federal and State Courts)."

In *New York & Richmond Gas Co. v. Prendergast*, 10 Fed. (2d) 167, the District Court approved the

report of the master, who made the following report on the subject of the amount of the allowance to be made for going concern value (p. 178):

> "Counsel for plaintiff in their main brief have submitted a tabulation of some 31 cases in which the element of going value was considered; this tabulation showing the ratio between the amount allowed for going value and the total amount found for the physical property. Of the cases listed, 14 were court cases and 17 commission cases. The former are summarized to show an allowance for going value averaging 12.13 per cent. of the total property, and 11.7 per cent. in the latter."

The percentage of going value to estimated reproduction cost new less accrued depreciation of the physical plant was fixed at 15%.

In *Consolidated Gas Company v. Prendergast*, 6 Fed. (2d) 243, the District Court approved the special master's report. On the subject of the additional allowance to be made for going value, the master said (p. 259):

> "'Although no definite percentage has been laid down as representing the measure of the 'going value' of a public utility company, examination of the cases has shown that *courts have generally found an amount approximating* 10 *per cent of the sum found as the value of the tangible property, as fairly representing the 'going value'. (Mobile Gas Company v. Patterson,* 293 Fed. 219; *Streator Aqueduct Company v. Smith,* 295 Fed. 385.)'"

The master found the total fair value of the properties of the Consolidated Gas Company to be $102,547,110.61, which amount included $3,500,000.00 for working capital and $9,000,000.00 for going value. This report was approved.

In *Southern Bell Telephone & Telegraph Co. v. Railroad Commission of South Carolina*, 5 Fed. (2d) 77, the special master, whose report was approved, said (p. 87):

> " * * * In his appraisal, the engineer has fixed this going concern value at $815,000, or 9.67 per cent of the reproduction cost new, which would seem to be justified under the decisions in *Knoxville v. Knoxville Water Co.*, 212 U. S. 1, 29 S. Ct. 148, 53 L. Ed. 371; *Omaha v. Omaha Water Co.*, 218 U. S. 180, 30 S. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084; *Denver v. Denver Union Water Co.*, 246 U. S. 178, 38 S. Ct. 278, 62 L. Ed. 649; *Bluefield Water Works, etc., Co. v. Public Service Com.*, 262 U. S. 679, 43 S. Ct. 675, 67 L. Ed. 1176; *Minneapolis v. Rand* (C. C. A.) 285 F. 818; *Pacific Gas etc. Co. v. San Francisco* (D. C.) 273 F. 937; *Des Moines Gas Co. v. Des Moines* (D. C.) 199 F. 204; *Des Moines Water Co. v. Des Moines* (C. C.) 192 F. 193; *Venner v. Urbana Waterworks* (C. C.) 174 F. 348; *National Waterworks v. Kansas City*, 62 F. 853, 10 C. C. A. 653, 27 L. R. A. 827; *S. W. Bell Tel. Co. v Fort Smith* (D. C.) 294 F. 102; *Mobile Gas Co. v. Patterson* (D. C.) 293 F. 208."

We believe that the foregoing citations will be sufficient to advise the Court as to the amounts which it has been customary for the courts, in recent decisions,

to add for this factor of value. This amount is a minimum of approximately 10% of the cost of reproducing new the physical properties.

(c) Fair allowance in present case.

In the present case, we have a remarkably complete record of all receipts and all disbursements in connection with the operations of both the Carquinez Bridge and the Antioch Bridge and the Company as a whole, from the very first day of the operation of the respective bridges through the year 1937 (Ready, Exh. 132, Tables 4, 5 and 6, R. 491, 493-4-5).

Hence, this is not one of the frequent cases in which the early expenses and receipts are missing, in which event the problem becomes largely one of guess work. In this case, the actual figures are all at hand.

If, in the present case, we take, for the first five years of operation, the very low figure of the deficiency of the income of the Carquinez Bridge below the 9% cost of money shown by the evidence, with interest, the result is the sum of approximately $300,000.00. This sum is less than 5% of the cost of reproducing new the physical property, before consideration is given to overheads (Ready, Exh. 118, R. 415, 416) and is most reasonable under any accepted standard.

As the court said in *New York Telephone Co. v. Prendergast*, 300 Fed. 822, 826:

> "The denial of *any* allowance for going value was also error of law."

So here, the Commission's failure to make any allowance for the cost of developing the business, or going concern value, constitutes clear error of law.

h. Summary—rate base.

The pertinent figures in the record, relating to the rate base may, accordingly, be summarized as follows:

	Without anything for going concern value.	Adding $300,000.00 for going concern value.
Book cost (with allowance for only portion of proper amount for interest during construction)	$ 7,949,954.00	—
Book cost (corrected by proper allowance for interest during construction—Gerwick and Ready, Exh. 117, R. 410, 411, col. 2)	8,332,622.46	$8,632,622.46
Reasonable historical cost (Gerwick and Ready, Exh. 117, R. 410, 411, col. 3)	8,139,307.84	8,439,307.84
Reproduction cost new—1937 (Gerwick and Ready, Exh. 118, R. 416)	8,743,231.14	9,043,231.14
Value of investment—January 1929 (Report of California Highway Commission entitled "Investigation and Report on Toll Bridges in the State of California," page 67; see also Mitchell, R. 288)	10,676,142.00	—
Net purchase price—October 20, 1932 (Report entitled "Report on Investigation of Carquinez Toll Bridge" transmitted by C. H. Purcell, State Highway Engineer, to Earl Lee Kelly, Director of Public Works, and by latter to Governor Rolph, page 38; see also Mitchell, R. 292)	10,288,840.00	—

The figure of $8,632,622.46 appearing in connection with the second item in the above tabulation, namely, "Book cost corrected" is the cost shown on the books,

corrected only so as to include the proper allowance for interest during construction plus a very reasonable allowance of $300,000.00 for going concern value. While this figure is approximately $200,000.00 higher than the "reasonable historical cost", it is also more than $400,000.00 lower than the estimated cost to reproduce the property new in 1937.

The figures thus far used do not include any allowance for the reasonable value of the franchise of the Rodeo Vallejo Ferry Company. This company organized American Toll Bridge Company and aided in its financing. On the completion of the Carquinez Bridge, the Rodeo Vallejo Ferry Company abandoned service, thus making available to the Carquinez Bridge its entire business and eliminating costly competition such as that which has been experienced and is now being experienced by the publicly owned and operated Golden Gate Bridge and San Francisco-Oakland Bay Bridge, by reason of existing ferry competition. The franchise of the Ferry Company had considerable value, estimated by Mr. Ready as being between $250,000.00 and $300,000.00 (Ready, R. 472-4; see also Exh. 127, R. 471, 472).

We believe that we could properly claim the inclusion of said figure, but in order to be entirely fair shall not do so.

In our attempt to develop a fair value or rate base which the Railroad Commission failed to find, we shall content ourselves by submitting as a *minimum* figure said sum of $8,632,622.46 for the purpose of testing the Commission's decision.

2. Money available for return on fair value under tolls fixed by Railroad Commission.

The decision of the Railroad Commission prescribed tolls for the year 1938 (Decision, R. 38).

To ascertain the amount of money available for return on the fair value or rate base, it is necessary, of course,

(a) To determine the gross operating revenue for 1938, under the tolls prescribed;

(b) To determine the operating and maintenance expenses, the various types of Federal, State and local taxes, depreciation and depletion; and

(c) to substract the total under (b) from the total under (a).

No witness for the Commission made any such computation.

No witness for the Commission presented any testimony as to what reasonable operating expenses would be incurred in 1938 or what the reasonable allowance for depreciation or depletion should be or what amount of money would be available for return on fair value or rate base in that year.

As we have hereinbefore shown, the Railroad Commission failed utterly to make any finding as to any of these matters.

While the decision contains a paragraph referring to Mr. Hunter's Exhibit 23, the figures there referred to are for the year *1937* and are based *on a rate suggested by Mr. Hunter but which the Commission did*

not establish. No witness for the Commission presented any operating expense figures for 1938 and the tolls actually established by the Commission were not referred to by anyone at any time during the proceedings.

The Company, however, introduced evidence showing, in complete detail, all revenues and expenses for each of the Carquinez and Antioch Bridges and for the Company as a ~~whole for each~~ year from the beginning to and including the year 1937 and also estimates for 1938 and each year following to and including the end of the franchises in 1948, both under the rates then in effect and under the 50¢ toll suggested by the witness Hunter but not established by the Commission (Ready—Exh. 132, R. 493-5; Exh. 134, R. 505, 506A, B, C; and Exh. 135, R. 508-511). The originals of each of these exhibits have also been separately forwarded to the clerk of this Court.

From the data in these exhibits, it is relatively simple to compute the revenues and expenses and the money remaining for return on fair value for the year 1938 under the tolls fixed by the Commission. We are again doing the work which the Commission should have done but failed to do.

As to operating revenues for 1938, the computation can readily be made. All that is required is to take Mr. Ready's Exh. 134, Carquinez Bridge, year 1938 (R. 506 A), and make the necessary changes (due to the application of the Commission's new tolls). In making the following computation, a 10% stimula-

tion of traffic under the new rate, if it were made effective, will be assumed.

As to operating expenses for the year 1938, we may take Mr. Ready's estimates of the various types of these expenses for the year 1938 as shown in Exh. 134, Carquinez Bridge, year 1938 (R. 506 A) modified as to the California gross revenue tax, which is 2% of the new operating revenue.

The effect of the Commission's rate, as applied to the 1938 traffic, is as follows:

CARQUINEZ BRIDGE—1938

Operating Revenues:		
1. Tolls	$1,135,277.	(computed as above)
2. Rents and miscellaneous	8,243.	(Exh. 134, p. 2, 1938; R. 506A)
3. Total	$1,143,520.	(1 plus 2)
Direct Operating Expense:		
4. Operation and maintenance	$ 146,700.	(Exh. 134, p. 2, 1938; R. 506A)
5. Gross Revenue tax (2%)	22,706.	(2% of 1)
6. Total	169,406.	(4 plus 5)
7. General expenses	63,852.	(Exh. 134, p. 2, 1938; R. 506A)
8. Total direct and general expenses	233,258.	(6 plus 7)
9. Amortization of investment	206,727.	(Exh. 134, p. 2, 1938; R. 506A)
10. Total expenses plus amortization	439,985.	(8 plus 9)
11. Net income before income taxes	$ 703,535.	(3 minus 10)
Income Taxes:		
12. Federal income tax	$ 108,511.	(Exh. 134, p. 2, 1938; R. 506A)
13. State franchise tax	24,726.	(Exh. 134, p. 2, 1938; R. 506A)
14. Total income taxes	133,237.	(12 plus 13)
15. Total expense	573,222.	(10 plus 14)
16. Net income available for return on fair value or rate base	$ 570,298.	(3 minus 15)

In its Answer to Petition for Writ of Review (R. 93), the Commission's attorneys concede that each of the above figures is correct with the exception only of the item of $108,511.00 for Federal income taxes.

As to this one remaining item, Mr. Ready computed the same on the Company's 1937 business. The accuracy of the computation is not challenged. The only point made is that Mr. Ready should have used a figure "accrued" for 1938 instead of the actual number of dollars which would be required in 1938 for the purpose of paying Federal income taxes in that year.

These taxes are, of course, computed on the 1937 income, just as each individual taxpayer computes his Federal income tax on the preceding year's business.

We submit that Mr. Ready handled the matter correctly. This is a *rate* case, *not* an *accounting* case. The problem is to determine how many dollars the Company will require to meet its obligations in the year 1938 and whether or not the tolls established by the Commission will be sufficient to enable the Company to meet those obligations in 1938 and still have remaining a sufficient sum to yield to it a fair return on the fair value of its property.

This problem is to be solved, not by technical accounting rules or practices adopted in connection with entirely different matters, but by determining the number of dollars which the Company will require, in the year 1938, to meet the obligations with which it will be confronted in that year, including the payment in 1938 of Federal income tax necessarily determined on the 1927 income.

Furthermore, we invite the Court's attention to the fact that Mr. Ready's testimony, in addition to being sound in principle, is the only testimony in the record as to what allowance for Federal income taxes must be included in computing the rates for 1938. No witness for the Commission testified on that subject and there is not a word of testimony in the record contrary to that offered by Mr. Ready as to that item.

Mr. Ready obviously handled the matter in the correct way, bearing in mind that this is a *rate* case.

It seems too clear for further argument that a *rate* making problem must be settled on *rate* making principles.

We believe that Mr. Ready's *method* of handling Federal income taxes, as well as the *amount* of such taxes reported by him to be paid in the year 1938, are correct and that the Court may safely take said figure of $570,298.00 as being the amount of revenue which would be available for return on fair value or the rate base in 1938 in the event that the rates prescribed by the Commission were effective throughout that year.

Said figure of $570,298.00 is a return of only 6.6% on the *minimum* fair value of $8,632,622.46 hereinbefore set forth.

The next problem is to determine whether or not a net income of $570,298.00 for the year 1938 would be sufficient to yield to American Toll Bridge Company a fair return on the fair value of its property in the Carquinez Bridge.

This problem requires a consideration of the cost of the money which this appellant has invested in the Carquinez Bridge and of what, under the specific facts of this case, would be a fair and reasonable rate of return on the fair value of this appellant's property in said Bridge.

To these problems, we shall next address ourselves.

3. **Cost of money.**

a. **Hazards of enterprise.**

The record shows that the construction of the Carquinez Bridge was a hazardous enterprise. There were grave doubts as to whether the bridge could be constructed at all. But the pluck and courage of the management, aided by several thousand small California investors in the Company's capital stock finally prevailed.

The Carquinez Bridge was the pioneer among the toll bridges across San Francisco Bay. It was built before Government funds were available for such projects and before many of the engineering problems had been solved.

At the time the Carquinez Bridge was built, it was the first of a series of long span bridges that were built in the United States and the first structure of the kind to be built in the vicinity of San Francisco Bay. The foundations of the bridge were among the deepest ever constructed. The construction was complicated by conditions in the Carquinez Straits, such as swift current and deep water (Mitchell, R. 258).

The water at Pier 3 was 80 feet deep before work commenced. Later, with scouring, it reached a depth of 115 feet in very soft ground, with rock at a depth of 135 feet (Derleth, R. 367).

The speed of the current ranged between 5 and 7 feet per second, a very high speed. This speed was higher than the speeds which the engineers encountered at the Golden Gate Bridge (Derleth, R. 367).

There were ~~further grave~~ doubts as to whether the bridge, if completed, would attract sufficient patronage to justify its construction from a financial point of view. The population in the San Francisco Bay territory was not as yet "bridge-minded".

These and other hazards and difficulties, physical and financial, had an inevitable effect in increasing the difficulty in securing the necessary construction funds and in increasing the cost of the money.

b. Necessity of first securing funds from sources other than bonds.

It was impossible for the Company to secure money from the sale of bonds until after the work was sufficiently advanced so as to give reasonable assurance that the bridge could be built (Derleth, R. 386).

The moneys secured from the sale of capital stock to several thousand small California investors, from advances from the Rodeo Vallejo Ferry Company and from other sources, before bond money could be made available, amounted, up to June 30, 1925, to the sum of $1,377,522.00 (Ready, Exh. 119, separately forwarded, Tables 2 and 3).

It was not until April, 1925, that arrangements were finally entered into for the sale of the Company's original bonds. This was two years after the commencement of construction work (Coleman, Exh. 1, R. 209, 221).

c. Original bond issue—1925.

Finally, in 1925, the Company sold its bonds as follows:

$4,500,000.00 of first mortgage 7% bonds; and
$2,000,000.00 of second mortgage 8% bonds (Coleman—Exh. 1, R. 209, 221).

It was necessary to sell the bonds at a discount of 10%. The total discount and expense incurred was $673,853.00. The net amount realized from the sale of bonds was $5,826,147.00 (Exh. 1, R. 209, 222).

d. Cost of money on original bond issue.

The cost of money secured by the Company from its original bond issue was as follows:

On the straight line basis—9.71 per cent;
On the sinking fund basis—9.07 per cent.
(Ready, Exh. 129, R. 476, 477).

Mr. Coleman, a witness for the Commission, likewise reported that the cost of the money, with amortization of bond discount and expense computed on the straight line basis, was 9.71% (Coleman, Exh. 1, R. 209, 222). Mr. Coleman did not testify as to the cost on the sinking fund basis.

e. Comparison with cost of bond money of other California utilities—1925.

In Table 1, attached to Exh. 129 (R. 476, 481), Mr. Ready sets forth the cost of bond money to some of the larger California public utilities in and about the year 1925, as shown from decisions of the Railroad Commission and exhibits filed in the proceedings. The utilities thus listed include

Los Angeles Gas and Electric Corporation
San Joaquin Light and Power Corporation
San Diego Consolidated Gas and Electric Company
Pacific Telephone and Telegraph Company
Southern California Gas Company
Pacific Gas and Electric Company
Great Western Power Company

The average cost of bond money to these utilities was 6%, as compared with a cost of *first* mortgage bond money to American Toll Bridge Company in 1925 amounting to 8.37% (Ready, Exh. 129, R. 476 478). It thus appears that the cost of first mortgage bond money to American Toll Bridge Company in 1925 was approximately 1.39 times the cost of bond money to major utilities of California at or about the same time.

This substantially higher cost of bond money to American Toll Bridge Company reflects the much greater hazard of its enterprise and the lesser desirability of its bonds from the investors' point of view.

f. Bond refunding issue—1935.

During the first twelve years of the term of its franchise, American Toll Bridge Company paid no dividends on its stock.

By 1935, the Company had reduced its outstanding bonds from $6,500,000.00 to $4,180,500.00, the latter amount being approximately one-half of the investment in the property. For the purpose of retiring these remaining bonds, the Company at that time sold an issue of refunding bonds totaling $4,300,000.00 bearing interest at the rate of 5½% per annum. These bonds were sold at 96½% of their face value plus accrued interest (Coleman, Exh. 1, R. 209, 222).

g. Cost of money on refunding bond issue—1935.

The cost of this money, *before* making allowance for the amortization of the remaining unamortized bond discount and expense and premium of the original bond issue, was 6.7% with amortization on the straight line basis and 6.65% with amortization on the sinking fund basis (Ready, Exh. 129, R. 476, 478). When allowance is made for the amortization of said unamortized bond discount, expense and premium of the original bond issue, these cost percentages become as follows (Ready, Exh. 129, R. 476, 478):

Amortization on the straight line basis—9.45%
Amortization on the sinking fund basis—8.95%

These figures also appear in the testimony of Mr. Ready (R. 485).

h. Comparison with cost of bond money of other California utilities—1935.

In Table 2 attached to Exhibit 129, Mr. Ready sets forth the cost of bond money to various California gas and electric companies, telephone companies and water companies which refinanced their outstanding bonds in or about the year 1935, as shown in various decisions of the Railroad Commission (R. 476, 482).

Said table shows an average cost of bond money in connection with refinancing, of approximately 4% for the major utilities and 5% for the smaller utilities (Ready, Exh. 129, R. 476, 479, 482).

As has already been shown, the bond refinancing of American Toll Bridge Company in 1935 was done at a cost of money of 6.65% *before* the inclusion of the unamortized bond discount and expense and premium of the original issue (Exh. 129, R. 476, 479).

It thus appears that in 1935 refunding bond money cost American Toll Bridge Company 1.66 times the similar cost to larger California utilities refinancing about that time and 1.33 times the cost of bond money to the smaller California utilities (Exh. 129, R. 476, 479).

These figures show the substantially higher cost of bond money to American Toll Bridge Company in connection with bond refinancing as late as 1935, as compared with large and small public utilities issuing refunding bonds at about the same time under authority of the Railroad Commission.

i. **Summary—cost of bond money.**

It thus appears that the cost of *bond* money in connection with the original 1925 issue and the 1935 refunding issue of the bonds of American Toll Bridge Company was as follows:

	Straight line amortization	Sinking fund amortization
Original bonds—1925	9.71%	9.07%
Refunding bonds—1935	9.45%	8.95%

From these figures, it is fair to assume a cost of *bond* money to the Company amounting to 9% (Ready, R. 521-2).

j. **Cost of all money from bonds and stock and in depreciation reserve.**

In Exhibit 129 (R. 476, 480), Mr. Ready presents an interesting and important table which shows the amount of the capital of American Toll Bridge Company which, in each year of the Company's operations from 1926 to 1948, is derived from bond and stock money and what percentage is invested in the depreciation reserve. As would be expected, the amount of the capital derived from bond and stock money is almost 100% in 1926 and falls to practically nothing in 1948. On the other hand, the amount of money in the depreciation reserve increases from almost nothing in 1926 to almost 100% in 1948, at which time the title to the Carquinez and Antioch Bridges will pass to the adjacent counties.

In another column, Mr. Ready takes the average cost of money from bonds and stock at 9%, being the figure heretofore shown to be correct, and assumes a 6% cost

of money in the depreciation reserve. On these bases, he reports the average cost of money to American Toll Bridge Company for each year, ranging from 8.9676% in 1926 to 6.0516% in 1948.

The average cost of money for the year 1938, which is the year here under consideration, is shown to be 7.8510%.

From this testimony, appears the very important fact that the average cost of the money invested by American Toll Bridge Company in its two bridges, whether such money was secured from the sale of bonds or the issue of stock or whether it is now invested in the depreciation reserve, is, for the year 1938, 7.8510%.

No other witness testified on the subject and this testimony stands unchallenged in the record.

4. Fair rate of return.

We next address ourselves to the question of what, under the specific facts relating to American Toll Bridge Company, would be a *fair rate of return* to be accorded to that Company.

a. Railroad Commission's established policy.

The Railroad Commission's established policy has been and is to allow a rate of return somewhat in excess of the cost of the money invested in the public utility's properties.

As the Commission said in *Application of Pacific Telephone and Telegraph Company,* 33 C. R. C. 737, 773:

"A reasonable return will normally be in excess of the average cost (of money). This principle has been enunciated by this Commission in numerous decisions."

The statement of the Supreme Court of California (96 Cal. Dec. 367, 380; R. 139) that appellant is not entitled to a rate of return as high as the cost of its money, is directly contrary to the policy which the Commission has, for many years, pursued and is not supported by any reference to any court case.

The California court further said that "A glance at the figures of the present bond issue . . . sufficiently indicates that the percentage claimed is not the measure of today's needs" (96 Cal. Dec. 367, 380; R. 139). To this comment, we make the following reply:

(1) The California court intimates that the cost of money in connection with the refunding bond issue of 1935 was less than that in connection with the original bond issue of 1925. Ergo, allow a lower rate of return. However "a glance at the figures of the present bond issue" shows that the cost of money in connection with that bond issue was 8.95%, with amortization on the sinking fund basis, a figure only slightly below the rate of return of 9.029% which, as we have shown, we believe to be fair.

(2) The proposed test of "the measure of today's needs", is, as we shall hereinafter show, an entirely false test when applied to a utility which is not and will not be in the market for any funds for additional capital expenditures.

Mr. J. G. Hunter, one of the Commission's witnesses, in response to questions from counsel for American Toll Bridge Company, testified to the same effect, as follows (R. 347):

"Q. (By Mr. Thelen): As a matter of fact, isn't it the policy of the Commission to ascertain the cost of money and then to allow something in excess of that? Hasn't that been the policy throughout all the years?

"A. (By Mr. Hunter): I rather think so.

"Q. Then in this case, Mr. Hunter, don't you think when it comes to the fixing of the actual rate, that it would be proper for the Commission to ascertain the cost of money and then make some additional allowance over that?

"A. Well, I should say the Commission should follow its precedents as much as it can if they have a case that is anywhere comparable."

By reference to decisions rendered by the Railroad Commission in many public utility rate cases, Mr. Ready showed the consistent application of said policy and the extent to which the rate of return as allowed has exceeded the cost of money to said utilities. This testimony appears in Table 3 attached to Exhibit 129 (R. 476, 483).

Mr. Ready there sets forth, as to important California public utilities, the weighted average cost of money, with discount and expense on the sinking fund basis, as the same appears in the exhibits of the Commission's witnesses in said cases, together with the rate of return found by the Railroad Commission to be reasonable as to these particular utilities.

The following table shows the names of the utilities, the weighted average cost of money, the rate of return found by the Railroad Commission to be reasonable and the ratio of said rate of return to said weighted average cost of money (R. 476, 479):

NAME OF UTILITY	Cost of money	Rate of return	Ratio of rate of return to cost of money
Southern California Gas Company	7.0%	9.0%	1.28
Pacific Telephone and Telegraph Company	6.09%	7.0%	1.15
Los Angeles Gas and Electric Corporation	6.14%	7.0%	1.14
San Joaquin Light and Power Corporation	6.36%	7.0%	1.10
Midland Counties Public Service Corporation	5.81%	7.0%	1.20
Pacific Gas and Electric Company	5.82%	6.7%	1.15
San Diego Consolidated Gas and Electric Company	6.43%	6.7%	1.04

It thus appears that in the case of these large and well established public utilities the Commission, in rendering its decisions as to the rates to be charged by them, allowed a rate of return which, on the average, is 1.15 times the weighted average cost of money to said utilities, respectively, figuring bond discount and expense on the sinking fund basis (Ready, Exh. 129, R. 476, 480; also R. 489).

b. Application of usual policy to facts of present case.

If *an average multiple of 1.15* is proper as applied to said large and well established California public utilities, it would seem that a multiple at least as

large, if not larger, should be applied in the case of the much smaller and less firmly established American Toll Bridge Company.

However, taking said multiple of 1.15, Mr. Ready (Exh. 129, R. 476, 480), applied it to the average cost of money to American Toll Bridge Company, computed as hereinbefore explained. The fair rate of return thus computed is found to range from 10.313% in 1926 (with a minimum of depreciation reserve money at 6%) down to 6.959% in 1948 (with a maximum of depreciation reserve money at 6%).

The fair rate of return thus found by Mr. Ready for the year 1938 is 9.029% (Exh. 129, R. 476, 480, last column).

This is the rate of return which appellant claims to constitute a fair and reasonable return for the year 1938 on the facts of this case and on the principles which the Railroad Commission itself has heretofore almost uniformly followed. This statement, as will be readily understood, is made only on the assumption that the Court finds it necessary to go beyond the point of impairment of contract obligations.

c. Comparison with rates of return allowed by Railroad Commission to other utilities.

We now invite the Court's attention to another test based on the Railroad Commission's own decisions as to other public utilities and leading to the same conclusion.

This test is the relationship between *the cost of bond money,* both in 1925 and 1935 and *the rate of return*

actually allowed to said utilities by the Railroad Commission in rate cases.

In and about 1925, the cost of bond money to the important public utilities listed in Table 1 attached to Exh. 129, was between 5.65% and 6.35%, whereas the cost of bond money to American Toll Bridge Company, in connection with the first mortgage bonds issued by it in that year was 8.37%. The cost of its first mortgage bond money to American Toll Bridge Company was thus 1.37 times the average cost of the bond money of said other utilities (Exh. 129, R. 476, 478).

Turning now to 1935, in which year numerous major public utilities in California refinanced at materially reduced interest rates, the cost of money in connection with the refunding bond operations of American Toll Bridge Company, excluding unpaid expenses in connection with the original issue, was 1.33 times the average cost of bond money to the smaller public utilities listed in Table 2 attached to Exh. 129 and 1.66 times the average cost of bond money to the larger public utilities there listed (Ready, Exh. 129, R. 476, 479).

It thus appears that the cost of first mortgage bond money to American Toll Bridge Company, both in 1925 and in 1935 was from at least one-third to two-thirds greater than the average cost of bond money to better established and less hazardous public utilities in California to whom the Commission has allowed an average return of approximately 7%.

Taking 7% as the average rate of return allowed by the Railroad Commission to these less hazardous public utilities (Ready, Exh. 129, R. 476, 483, 488) and applying said multiple of 1.33 thereto, the result would be a rate of return of 9.33%, which figure does not vary greatly from that secured in the preceding section of this brief.

d. Rates of return found necessary to avoid confiscation.

We shall now invite the Court's attention to decisions of this Court and of the lower Federal courts on the question of the rate of return which is necessary to avoid confiscation.

In *Brush Electric Company v. City of Galveston*, 262 U. S. 443, this Court affirmed the decree of a U. S. District Court finding that an electric light and power company operating in the City of Galveston was entitled to a return of 8 per cent. (p. 445).

In *Bluefield Water Works & Improvement Company v. Public Service Commission of West Virginia*, 262. U. S. 679, involving an order of a state commission fixing rates to be charged for water, the Court concluded (p. 695):

> "Under the facts and circumstances indicated by the record, we think that a return of *6 per cent* upon the value of the property is *substantially too low* to constitute just compensation for the use of the property employed to render the service."

In *United Railways and Electric Company of Baltimore v. West*, 280 U. S. 234, this Court held that in

the light of recent decisions of the Court and of the lower Federal courts, it is probable that a return of 7½% or 8% is necessary to avoid confiscation.

At page 251, the Court, speaking through Mr. Justice Sutherland, said:

> "It is manifest that just compensation for a utility, requiring for efficient public service skillful and prudent management as well as use of the plant, and whose rates are subject to public regulation, is more than current interest or mere investment. Sound business management requires that after paying all expenses of operation, setting aside the necessary sums for depreciation, payment of interest and reasonable dividends, there should still remain something to be passed to the surplus account; and a rate of return which does not admit of that being done is not sufficient to assure confidence in the financial soundness of the utility to maintain its credit and enable it to raise money necessary for the proper discharge of its public duties. In this view of the matter, *a return of 6.26 per cent. is clearly inadequate. In the light of recent decisions of this Court and other Federal decisions, it is not certain that rates securing a return of 7½ per cent. or even 8 per cent. on the value of the property would not be necessary to avoid confiscation.*"

In *Los Angeles Gas & Electric Corporation v. Railroad Commission of California*, 289 U. S. 287, the Court found that "considering the financial history of the company" and other factors, it could not hold a return of 7% to be so low as to be confiscatory.

The financial history of the company thus referred to is shown in a Note on page 292 to have been as follows:

> "Dividends have been paid on its common stock of 7.20 per cent. per share ($100 par value) in 1916, 1917 and 1918; 7.4 per cent. in 1919; 8.4 per cent. in 1920, 1921 and 1922; 8.7 per cent. in 1923; 33.75 per cent. in 1924, included in which is 25 per cent. as a stock dividend of $2,500,000; 9 per cent. in 1925; 9.815 per cent. in 1926; 35.17 per cent. in 1927, which includes a stock dividend of 21.42 per cent., or $3,000,000; 15 per cent. in 1928, and 17 per cent. in 1929. The Company's surplus has grown from $381,212.97 in 1916 to $4,176,663.09 in 1929, while its depreciation reserve increased from $3,804,383.36 to, as said above, $16,804,105.15."

It can readily be understood that even though a return of 7% might not be held to be confiscatory as to one of the largest and most prosperous utilities in the United States, a return of at least 2% more would be required for a small, hazardous enterprise with only 9 years more of franchise life, such as American Toll Bridge Company.

In *Dayton Power & Light Co. v. Public Utilities Commission of Ohio,* 292 U. S. 290, this Court found that on the facts of that case and in the light of business conditions then existing a return of 6½% was not confiscatory.

In *West v. Chesapeake & Potomac Telephone Company of Baltimore,* 295 U. S. 662, Mr. Justice Roberts

referred to a rate of return necessary to afford just compensation as follows (p. 671):

> "So, where by legislation prescribing rates or charges the use of the property is taken, just compensation assured by these constitutional provisions is a reasonable rate of return upon that value."

In a foot-note the Court cites a large number of Federal decisions in support of that principle. As will be observed, the utility must be accorded "a reasonable rate of return" upon fair value. Anything less than that is confiscation.

The rates of return held requisite in a representative list of decisions of lower Federal courts within the last few years are as follows:

- 8% in *Reno Power, Light & Water Co. v. Public Service Commission of Nevada*, 298 Fed. 790, 803;
- 8% in *Louisiana Water Co. v. Public Service Commission of Missouri*, 294 Fed. 954, 957;
- 8% in *Indiana Bell Telephone Co. v. Commission*, 300 Fed. 190, 201;
- 8% in *New York & Queens Gas Co. v. Prendergast*, 1 Fed. (2d) 351, 370;
- 7½% in *Duluth St. Ry. Co. v. Railroad and Warehouse Commission of Minnesota*, 4 Fed. (2d) 543, 550;
- 8% in *Brooklyn Union Gas Co. v. Prendergast*, 7 Fed. (2d) 628, 672;
- 8% in *Springfield Gas & Electric Co. v. Public Service Commission of Missouri*, 10 Fed. (2d) 252, 255;

8% in *New York & Richmond Gas Co. v. Prendergast,* 10 Fed. (2d) 167, 187;

7½% in *Pacific Telephone and Telegraph Co. v. Whitcomb,* 12 Fed. (2d) 279, 286;

8% in *Brooklyn Borough Gas Co. v. Prendergast,* 16 Fed. (2d) 615, 622.

The public utilities involved in the foregoing cases were all stable, well-established concerns, none of them confronted with an imminent termination of their business and loss of their property.

If an 8% rate of return was deemed necessary to avoid confiscation as to most of them, it would seem only fair and reasonable that the return to be accorded to American Toll Bridge Company, with its difficulties and hazards, in order to avoid confiscation, should be not less than 9%.

In *Clark's Ferry Bridge Co. v. Public Service Commission of Pennsylvania,* 291 U. S. 227, this Court held that a return of 7% was adequate (p. 241). However, there was nothing to show any elements of hazard in connection with the construction, financing or operation of this particular toll bridge. A predecessor toll bridge had been erected at the same spot in 1828 and had been operated for almost a century (*Herring v. Clark's Ferry Bridge Co.,* P. U. R. 1926D 514, decided by the Pennsylvania Public Service Commission on June 8, 1926).

The successful history of the old bridge in meeting the actual traffic conditions for almost a hundred years necessarily had a very favorable influence on

the cost of financing the new bridge (*Public Service Commission of Pennsylvania v. Clark's Ferry Bridge Co.,* P. U. R. 1932C 295, 301, decided by the Pennsylvania Public Service Commission on February 2, 1932). The situation with reference to the cost of money in connection with the construction of the new bridge was obviously very different from that of the present case, in which there never had been a toll bridge at this location, and in which there were great physical hazards which naturally raised questions as to whether the bridge could ever be constructed and great traffic hazards arising from the uncertainties as to which way the traffic would move and in what volume. None of these hazards were present in connection with the construction of the new Clark's Ferry bridge.

We have found one toll bridge rate case in which the investment was declared by the State Commission to be hazardous. In *Re Purcell-Lexington Toll Bridge Company,* P. U. R. 1925A 253, decided by the Oklahoma Corporation Commission on August 26, 1924, the Commission had under consideration the tolls charged by a toll bridge across the South Canadian River between the towns of Purcell and Lexington, Oklahoma.

The Commission found that the investment was "an extremely hazardous investment" and that, accordingly, a fair rate of return on the fair value of the property would be *12%* (p. 259).

e. Only witness who testified as to what fair rate of return would be was Mr. Ready.

No witness for the Railroad Commission testified as to what a fair rate of return would be.

The only witness who testified on that subject was Mr. Ready. It was his testimony that a fair return on the fair value of the Carquinez Bridge for 1938 would be 9.029% (Ready, Exh. 129, R. 476, 480).

Appellant respectfully submits that, on the record of this case, it is entitled, to avoid confiscation, to a return of 9% on the fair value of the Carquinez Bridge property if the case is to be decided on the issue of confiscation and not on the issue of impairment of contract obligations.

5. In the light of the specific facts of the Carquinez Bridge, a return of only 6.6% on fair value is confiscatory.

a. The return is substantially below what the Commission itself found would be a reasonable return.

In its decision, the Commission said (R. 38):

> "The results estimated for the 1938 revenue *should* produce a return of approximately 7.5% on the investment in the bridge structure. When tested upon the bases usually followed by the Commission, such a rate of return is reasonable for this particular company, considering the unusual circumstances under which its properties were constructed and have been and are operated."

But the tolls established by the Commission for the Carquinez Bridge will yield a return of not to exceed 6.6%.

Hence, on the Commission's own finding as to what would constitute a reasonable rate of return, the Commission's order is clearly shown to be confiscatory.

b. The return is far below the actual cost of the money.

Furthermore, as we have shown, the cost of the money actually expended in the construction of the Carquinez Bridge was, on the *lower* of the two possible amortization bases, 9.07% (Exh. 129, R. 476, 477).

Also, the cost of the money involved in the bond refunding operation of 1935 was, again on the *lower* of the two possible amortization bases, 8.95% (Exh. 129, R. 476, 478).

On these facts, a return of only 6.6% is clearly confiscatory.

c. There is here no question as to the cost of money now required by appellant for further capital expenditures.

In *Bluefield Water Works & Improvement Company v. Public Service Commission*, 262 U. S. 679, this Court said (p. 692):

> "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit *and enable it to raise the money necessary for the proper discharge of its public duties.*"

While we concede that such a test is eminently fair and proper as to an expanding utility which requires additional funds to make improvements and other

capital expenditures, we submit that this and similar tests are inapplicable to a company such as appellant. This Company will not be called upon to make further capital expenditures. Its toll bridge has been constructed and it will have no occasion to go into the security markets to obtain funds for expansion or improvement.

Its chief concern is that it be permitted earnings sufficient so that it may be able to withdraw its capital from the enterprise, with reasonable interest to its bondholders and fair dividends to its stockholders, by the time when it will be divested of its property on the expiration of its franchises in 1948.

Anything less than that is confiscation.

6. **Conclusion on confiscation of Carquinez Bridge.**

We have shown that a return of only 6.6% on a minimum fair value of the Carquinez Bridge would be

—less than the return of 7.5% which the Commission found that the Company should receive (R. 38);

—less than actual cost in 1938 of all the money in the project, determined to be 7.851% (Ready, Exh. 129, R. 476, 480);

—less than the cost of money in connection with the original bond issue of 1925, determined by Mr. Coleman and Mr. Ready to be 9.71% (Coleman, Exh. 1, R. 209, 222; Ready, Exh. 129, R. 476, 477);

—less than the cost of money in connection with the refunding bond issue of 1935, determined to be 8.95% (Ready, Exh. 129, R. 476, 478);

—far less than would result from the Commission's usual policy of ascertaining the rate of return by applying a multiple to the cost of money; and

—substantially less than the rates of return which the Federal courts have generally required to avoid confiscation even in the cases of well-established and prosperous utilities.

We have also shown that a return of 9 per cent is

—required by the application to the actual cost of money of the average multiple heretofore used by the Commission (1.15×7.851=9.029%, or 1.28 ×7.851=10.05%); (Exh. 129, R. 476, 479);

—in line with the rates of return allowed by the Commission to larger and more stable California public utilities, bearing in mind the substantially higher cost of first mortgage bond money to appellant (1.33×7.0=9.31%);

—in line with the rates of return required by the Federal courts to avoid confiscation, bearing in mind the higher cost of money, the greater hazards and the shorter life of appellant; and

—in line with rates of return which have been found proper for hazardous toll bridge companies, as illustrated by the 12% return allowed by the Oklahoma Corporation Commission.

Finally, on this point, we invite the Court's attention to the fact that the only witness who testified on the subject of what a fair return would be under the specific facts of this case was Mr. Ready and that it is his testimony that a fair return on the fair value of the Carquinez Bridge for 1938 would be 9.029% (Exh. 129, R. 476, 480, last column).

We submit, with confidence, that the Commission's decision confiscates appellant's property in the Carquinez Bridge and violates the appellant's rights under Section 1 of Article XIV of the Amendments to the Constitution of the United States.

B. THE RAILROAD COMMISSION'S ORDER CONFISCATED APPELLANT'S PROPERTY IN BOTH THE CARQUINEZ AND THE ANTIOCH BRIDGES BECAUSE IT FAILED TO ACCORD A FAIR RETURN ON FAIR VALUE.

1. Rate base.

The Railroad Commission made no finding as to the fair value or a proper rate base of the Antioch Bridge or of any factor which it would be necessary to consider in fixing tolls to be charged by that bridge.

The evidence, however, contains all the data from which all such factors could have been determined.

The Company's investment in the Antioch Bridge is recorded on its books as \$1,734,477.02 (Coleman, Exh. 1, R. 209, 217).

The reasonable historical cost of the Antioch Bridge, without allowance for the cost of developing the business, is \$1,597,789.00 (Gerwick and Ready, Exh. 120, R. 432).

The estimated cost of reproducing the bridge new as of 1937 is \$1,705,964.00 (Gerwick and Ready, Exh. 121, R. 435).

If the same method of determining the cost of developing the business is used as to the Antioch Bridge as we hereinbefore used with reference to the Carquinez Bridge (income below a 9% cost of money,

1926 to 1929, incl.), the minimum amount to be added for this item is found to be $550,000.00.

On the basis hereinbefore used for determining *minimum* fair value of the Carquinez Bridge, and taking the *lowest* of said figures for the Antioch Bridge, a *minimum* fair value of both bridges together would be as follows:

Carquinez Bridge—minimum fair value	$ 8,632,622.00
Antioch Bridge—reasonable historical cost	1,597,789.00
Antioch Bridge—cost of developing the business	550,000.00
Fair value of both bridges	$10,780,411.00

This figure may be compared with the following figures heretofore reported in public documents by the California Highway Commission and the Department of Public Works, prior to the time when the present controversy arose:

Value of investment, both bridges, (January 23, 1929)—"Investigation and Report on Toll Bridges in the State of California", page 71 (see also Mitchell, R. 288)	$11,846,409.00
Fair purchase price, both bridges, (October 20, 1932)—"Report on Investigation of Carquinez Toll Bridge" submitted by State Highway Engineer C. H. Purcell to Director of Public Works Earl Lee Kelly and by the latter to Governor Rolph, page 38 (see also Mitchell, R. 291)	$11,032,140.00

In this brief we shall take as the *minimum* fair value of both bridges together, the *lowest* of said three figures, namely, $10,780,411.00.

2. Money available for return on fair value under tolls fixed by Railroad Commission.

The amount of money which would be available in 1938 for return on fair value, in the event that the

tolls fixed by the Commission should become effective as to both the Carquinez and the Antioch Bridges, can readily be ascertained by recourse to Mr. Ready's Exhibit 134 (R. 505, 506 C).

It will merely be necessary to turn to page 4 of that exhibit, relating to American Toll Bridge Company's operation of both toll bridges, year 1938 (R. 506, 506 C), and make the necessary changes in operating revenue (due to the application of the 45¢ plus 5¢ proposed tolls) and in the item of gross revenue tax.

Here, also, we shall assume a 10% stimulation in the business of both bridges, combined, resulting from the assumed effectiveness of the new tolls prescribed by the Commission.

The effect of the new tolls, applied to both bridges, on 1938 traffic, would be as follows:

CARQUINEZ AND ANTIOCH BRIDGES TOGETHER—1938

Operating Revenues:		
1. Tolls	$1,241,976.	(computed as above)
2. Rents and miscellaneous	8,363.	(Exh. 134, p. 4, 1938; R. 506C)
3. Total	$1,250,339.	(1 plus 2)
Direct Operating Expenses:		
4. Operation and maintenance	$ 189,885.	(Exh. 134, p. 4, 1938; R. 506C)
5. Gross revenue tax (2%)	24,839.	(2% of 1)
6. Total	241,724.	(4 plus 5)
7. General Expenses	69,860.	(Exh. 134, p. 4, 1938; R. 506C)
8. Total direct and general expenses	284,584.	(6 plus 7)
9. Amortization of investment	244,887.	(Exh. 134, p. 4, 1938; R. 506C)
10. Total expenses plus amortization	529,471.	(8 plus 9)

11. Net income before income taxes	$ 720,868.	(3 minus 10)
Income Taxes:		
12. Federal income tax	$ 92,173.	(Exh. 134, p. 4, 1938; R. 506C)
13. State franchise tax	22,375.	(Exh. 134, p. 4, 1938; R. 506C)
14. Total income taxes	114,548.	(12 plus 13)
15. Total expense	644,019.	(10 plus 14)
16. Net income available for return on fair value or rate base	$ 606,320.	(3 minus 15)

The foregoing figures were computed in exactly the same manner as the corresponding figures in the companion tabulation as to the Carquinez Bridge—1938, appearing on page 148 of this Brief; and by the same witness (Mr. Ready).

We assume that the attorneys for the Commission will concede that each of said figures is correct, except that they will take the same position as heretofore with reference to the item of Federal income tax. As to that item, we are satisfied that our position is correct.

On said minimum fair value or rate base of $10,780,411.00 hereinbefore set forth for the combined Carquinez and Antioch Bridge properties, a net income of $606,320.00 would yield a return of only 5.6%.

This is the really significant figure in the case, under the issue of confiscation, for the reason that it was the Commission's duty to fix the tolls for *both* the Carquinez and the Antioch Bridges, being competitive parts of the single, unified transportation system of American Toll Bridge Company.

The Commission could not lawfully sever the Carquinez Bridge from the single, unified transportation system of American Toll Bridge Company and fix tolls for that bridge alone, with the design of fixing tolls lower than could possibly be fixed by it for *both* bridges, then relying on the force of competition to drive the Antioch Bridge tolls down to the unfairly low level thus fixed for the Carquinez Bridge.

3. Effect of Commission's decision would be to confiscate property of American Toll Bridge Company in both Carquinez and Antioch Bridges.

A return of only 5.6% on both bridges together would be—

(1) 7.5%—5.6%=1.9% below the rate of return which the Commission itself found would be reasonable for the Company;

(2) 9.71%—5.6%=4.11% below the cost of the bond money actually used in the construction of the Company's bridges;

(3) 8.95%—5.6%=3.35% below the cost of money resulting from the bond refunding operation of 1935; and

(4) 7.851%—5.6%=2.251% below the cost as of 1938 of *all* money invested in the two bridges.

We believe it to be too clear for further discussion that the Commission's tolls will, if permitted to become effective, confiscate the transportation system of American Toll Bridge Company, consisting of the Carquinez and the Antioch Bridges, and violate the Company's rights under Section 1 of Article XIV

of the Amendments to the Constitution of the United States.

C. THE RAILROAD COMMISSION'S ORDER CONFISCATED APPELLANT'S PROPERTY IN BOTH BRIDGES, FOR THE FURTHER REASON THAT IT FAILED TO RECOGNIZE AND GIVE EFFECT TO THE RIGHTS OF APPELLANT IN ITS WASTING ASSETS, NAMELY, THE CARQUINEZ AND ANTIOCH BRIDGES, THE TITLE TO BOTH OF WHICH BRIDGES WILL PASS TO THE ADJACENT COUNTIES ON THE EXPIRATION IN 1948 OF THE FRANCHISES GRANTED BY SAID COUNTIES FOR THE CONSTRUCTION AND OPERATION OF SAID TWO BRIDGES.

The Carquinez and Antioch Bridges of American Toll Bridge Company are "wasting assets".

At the expiration of the franchises in 1948, the bridges will become the properties of the Counties of Contra Costa and Solano and the Counties of Contra Costa and Sacramento, respectively, without the payment of any compensation to American Toll Bridge Company (Coleman, Exh. 1, R. 209, 227; Hunter, Exh. 19, R. 264, 269, 272).

With each day that passes, the Company's assets in its two bridges are "wasting away", looking to the day when the franchises expire in 1948.

Unless American Toll Bridge Company has, by the time the life of its franchises expire in 1948, fulfilled its obligations to its bondholders and its stockholders and has received back its investment, it will never be able to do so.

1. **The Law of Wasting Assets.**

It is well established that a public utility which owns and operates a wasting asset is entitled to receive rates sufficiently high so that, in addition to being able to pay its expenses of operation, maintenance and taxes and receiving a fair return, it will also be able to take care of both *depreciation* and *depletion.*

In *Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio,* 292 U. S. 398, the question related to the rates charged by appellant for natural gas sold in Columbus, Ohio. At page 404, this Court, speaking through Mr. Justice Cardozo, said:

> "To withhold from a public utility the privilege of including a *depletion* allowance among the operating expenses, while confining it to a return of 6½% upon the value of its *wasting assets, is to take its property away from it without due process of law,* at least where the waste is inevitable and rapid."

Again, at page 405:

> "We hold that a fair price for gas delivered at the gateway includes a reasonable allowance for the *depletion* of the operated gas fields *and* the concomitant *depreciation* of the wells and their equipment."

In *Arkansas-Louisiana Gas Co. v. City of Texarkana,* 17 Fed. Supp. 447, the District Court, speaking of "depletion and depreciation allowances", said (p. 460):

> "In all cases of this character (rates for natural gas), it is necessary that the plaintiff be allowed to burden operations with a charge sufficient to cover *depletion and depreciation*. The *former* is necessary in order to reimburse the utility for *wasting assets* and the *latter* is to cover the wear and tear incident to the use of physical property. In connection with wear and tear, consideration must also be given to obsolescence and inadequacy."

In *United Fuel Gas Company v. Railroad Commission of Kentucky,* 13 Fed. (2d) 5[illegible]0, the question likewise related to rates to be charged for natural gas, obviously a wasting asset. At page 518, the court said:

> "The location and quantity of natural gas below the surface of the earth is at best highly speculative, and when such gas is once exhausted it cannot be reproduced or replaced. Because of the exhaustible character of his product, the natural gas operator is entitled to receive through the rates charged, not only his actual expenditures of operation and depreciation charges, in the sense of such sum as will keep his plant at 100 per cent. operating efficiency, but *he is also entitled to such rates as will refund to him his entire capital investment within the life of the business. When the field is finally exhausted, as it must be, the reserve for depletion, or amortization reserve, should be sufficient to repay to the investor 100 per cent. of the original investment.* Not only is the *natural gas itself* subject to exhaustion, but large quantities of *casing in the wells, pipe line* in the field and elsewhere, and

other plant investment, are practically lost upon the exhaustion of the field. The cost of salvaging such material would, in many instances, be more than its value. *The right to this amortization or depletion reserve, or the right of the company to earn such sum as would reimburse the investor for his original capital investment at the termination of the business, is universally recognized. This is in addition to what is ordinarily denominated a charge for depreciation or deterioration by use.*

"So far as this factor alone is considered, it would seem quite manifest that such amortization or depletion reserve must be calculated upon the *investment,* and *not* upon the *present value* of the so-called acreage. *The investor is entitled to reimbursement through this reserve only to the extent of his original investment, plus a reasonable earning during the period of operation.* In the ordinary utility, the law contemplates an indefinite continuance of the business, and allows no earnings in excess of a reasonable return, which will ultimately return to the investor the amount of his capital investment in cash. In a natural gas utility, we must look forward definitely to the complete exhaustion of the gas supply and the termination of the business upon a future day, which is certain to come. *When that day does come, the operator will have been deprived of none of his property without due process of law, if he then receives back the amount of his original investment, plus a reasonable return for the period during which it has been devoted to the public use.*"

At page 523, the court further said:

"Attention has already been called to the fact that there is a marked *distinction between de-*

pletion, in the sense of the exhaustion of supply, *and depreciation*, in the sense of deterioration of equipment from age and use. We have pointed out that *a depletion charge*, in estimating the reasonable rate, must be figured upon the investment value, and over the entire estimated life of the properties. *It must be such that, upon the exhaustion of the properties, the operator will have received his entire investment, plus a reasonable return upon such investment, during the dedication of it to public use.*"

This decision was affirmed on appeal. *United Fuel Gas Company v. Railroad Commission of Kentucky*, 278 U. S. 300.

2. The Railroad Commission refused to apply the law of wasting assets.

The Railroad Commission, while recognizing that the Carquinez and Antioch Bridges are wasting assets, refused to apply to them the law of wasting assets. The Commission took the position that because it had only very recently (1937) acquired any jurisdiction over toll bridge corporations, it was not interested in their financial condition in the past but only "from now on".

On the subject of the proper definition of the words "wasting assets" as applied to a situation such as that now before this Court, Mr. Coleman, one of the Commission's financial experts, testified as follows (R. 343):

"Q. (By Mr. Thelen): Now when Mr. Rowell asked you that question, referring to a wasting

asset, please state whether you understood that term, as applied to the facts in this case, to mean that the investment from the beginning is to be treated as a wasting asset and is to be returned with fair interest or dividends by the time the franchise expires?

"A. (By Mr. Coleman): I think that is correct. I have considered that here was an asset whose value would cease on a certain known date.

"Q. And by that date, of course, it would be necessary to have the investment returned?

"A. That is right.

"Q. And in the meantime, those who made the investment would naturally expect to receive reasonable interest, if it were bonds, and reasonable dividends if it were stock?

"A. I presume that would be the reason they would make the investment."

The Presiding Commissioner then interrupted to ask whether the investor should have his reasonable dividends *from the beginning,* to which question the witness answered that he was looking to the question only "from now on" (R. 343).

Then occurred the following further colloquy (R. 343):

"Q. (By Mr. Thelen): It would not be proper just to jump in at the middle and say 'Regardless of all the sacrifices that were made in the past, we won't pay them back to you but will simply take care of the future'; that would not be a fair proposition, would it, in the case of a wasting asset?

"A. (By Mr. Coleman): In this particular wasting asset, or in general?

"Q. Any one.

"A. Of course, in this particular one we had no voice in the matter until now, and that was the reason we were considering it *from now on.*"

3. The Railroad Commission made no finding as to amount to be allowed for either depreciation or depletion.

There is no support in the Commission's decision for the statement of the Supreme Court of California (96 Cal. Dec. 367, 380; R. 139) that "in computing the net annual receipts, allowances were made for depreciation reserves, including amortization of the entire investment before the expiration of the franchise period." A most careful reading of the Commission's decision will fail to reveal any "computing of net annual receipts" under the tolls established by the Commission and no finding of any number of dollars to be allowed for either depreciation or depletion for 1938 or any subsequent year.

Here, again, this Court and counsel are being asked to do the Commission's work.

The omission to make these essential and basic findings is all the more noteworthy because appellant presented complete evidence on the subject, extending throughout the entire term of appellant's franchises, from beginning to end.

4. Under the Railroad Commission's tolls, appellant would be unable, in the sum of $2,841,767.00, to meet its obligations to its bondholders and stockholders by the time its assets will have passed from its ownership.

a. Situation at the hearing.

The Commission introduced Exhibit 22 (Coleman) entitled "Estimated Cash Requirements" (R. 285)

for the purpose of showing that appellant could suffer a substantial reduction in its revenues and still be able to pay principal and interest on its bonds and an 8 per cent dividend on its stock in the *future* and retire its stock at par by the time when appellant would lose its property in 1948.

The exhibit was a *partial* application of the "wasting asset" theory, based on the effect of reduced tolls on appellant's ability to meet its obligations to its bondholders and stockholders prior to the expiration of its franchises in 1948. As will shortly appear, appellant carried this inquiry to its correct, logical and *complete* conclusion.

Said Exhibit 22, however, ignored the fact that up to December 31, 1935, no dividends had ever been received by the stockholders and that the principal amount of these unpaid dividends at 8% amounts to $2,404,600.00 (Coleman, R. 344; Haines, R. 461 468).

Mr. Coleman testified that ten years' dividends which were not received by the stockholders would amount at an 8% dividend rate to approximately $2,250,000.00 (R. 344).

Then occurred the following question and answer (R. 344):

> "Q. (By Mr. Thelen): And, of course, if one takes the theory of a wasting asset and applies it logically from the beginning, instead of jumping into the middle of the period, those stockholders would have been taken care of as far as dividends are concerned?

"A. (By Mr. Coleman): That would be correct if you started from the beginning."

Exhibit 22 sets forth merely an "average year" without reference to the actual cash requirements of any particular year. This is a matter of considerable importance, for the reason that the Company must, each year, meet its cash requirements for that particular year. In this respect, the Company cannot rely on "averages" (Haines, R. 458).

The exhibit assumes that capital stock could be retired from property which is not cash and as to which serious doubts exist as to when it could be converted into cash and how much cash could be realized therefrom (Haines, R. 458-9; see also Haines—Exh. 126, Statement of Estimated Cash Requirements, Note 1, R. 460, 462-A).

The exhibit assumed the retirement of capital stock at $1.00 per share, although a substantial portion of the outstanding stock, including all of that sold to several thousand stockholders in California, was sold at $2.00 per share, netting the Company $1.60 per share (Coleman, R. 345). To all of these people, a dividend of 8¢ per share means a return of only 4% on their investment.

Provision was made for the amortization of the bonds over a period of ten years, whereas it is necessary, under the bond mortgages, to pay off the same completely within approximately eight and one-half years. The significance of this item in Exhibit 22 appears from the fact that said exhibit allows for bond

interest and retirement, on the basis of an average for ten years, only the sum of $421,498.00, whereas the actual amount required in 1938 and the next succeeding six years will be in excess of $565,000.00 each year (Haines, R. 458; see also Haines, Exh. 126, Statement of Estimated Cash Requirements, Item "Debt Service" and Note, R. 460, 462-A).

Exhibit 22 spoke as of October 31, 1937. However, by December 31, 1937, the situation had already substantially changed so that the computations of Exhibit 22 could no longer be relied upon. The net current assets of the Company, after giving effect to a Federal tax accrual, were only $20,000.00, as contrasted with the very much larger figure shown in Exhibit 22 (Haines, R. 465; see also Haines, Exh. 126, Statement of Cash Requirements, Note 2, R. 460, 462-A).

All of these matters and others were developed in cross-examination of Mr. Coleman (R. 342-345) and in direct examination of Mr. J. W. Haines, a partner in the firm of Haskins & Sells, who appeared as a witness for American Toll Bridge Company (R. 457-469; see also Haines, Exh. 126—Statement of Estimated Cash Requirements and Note thereto, R. 460, 462-A).

However, the presentation of Exhibit 22 may be assumed to evidence a realization by the witness of a responsibility in the case of a "wasting asset" different from and beyond that which exists in the usual case of a public utility whose franchises either extend over long periods or are without limit as to time.

On this subject, the following colloquy occurred between Mr. Coleman and Mr. Thelen (R. 344-345):

"Q. (By Mr. Thelen): This case is quite different, is it not, from the normal case of a public utility which has a franchise lasting a great many years or which is indeterminate in character?

"A. (By Mr. Coleman): Yes, sir, so far as I know, it is the first one of this kind.

"Q. First one the Commission has ever had, isn't it?

"A. So far as I know.

"Q. In the case of the usual public utility which has an indeterminate franchise, or at least a long term franchise, if the dividends cannot be paid during the early years there is at least the hope that they can be made up later?

"A. That is right."

After Exhibit 22 had been presented, American Toll Bridge Company submitted, through Mr. Haines, Exhibit 126 (R. 460, 462-A), which is a statement, prepared with meticulous care and accuracy, showing the actual cash requirements, in each year from 1938 to June 30, 1948 in the event that American Toll Bridge Company should undertake to meet its obligations on principal and interest of its bonds, pay 8% dividends on its capital stock and retire the stock at par (i. e. $1.00, not $2.00 per share) by the time the Company's franchises will have expired.

In a subsequent supplemental exhibit (No. 136, R. 512, separately forwarded), Mr. Haines showed in great detail how all the computations in Exhibit 126 on the important subject of the various classes of

Federal taxes—capital stock, excess profits, normal income and undistributed profits—were made.

A comparison of the cash *required,* year by year, with Mr. Ready's estimates of the cash which would be *available* under a suggested 50¢ toll (Exh. 134, page 4, R. 506, 506-C) shows that the 50¢ toll would have failed, by a wide margin, to enable the Company to meet its obligations to its bondholders and its stockholders, even if the failure to pay any dividends whatever to its stockholders during the period from May 21, 1927 to December 31, 1935 be entirely disregarded.

b. Situation under tolls established by Commission.

We turn now to the situation under the tolls as actually established by the Commission.

Attached to this brief as Appendix No. 3, the Court will find a statement entitled "Estimated Operating Results—American Toll Bridge Company—1938-1948 —Under Rates as per C. R. C. Decision". We have prepared this exhibit for the purpose of ascertaining whether or not the tolls actually established by the Commission will really enable the Company to meet its obligations to its bondholders and its stockholders.

The exhibit and the sources of its figures are readily understood. The operating revenue figures are secured by applying to the traffic shown in Exhibit 134, page 4 (R. 505, 506-C), the new rate fixed by the Commission, assuming that a 10% stimulation in auto traffic will result from the lowering of the tolls. The items of "total direct and general expenses" and "state franchise and federal income tax" are readily

ascertainable from said page 4 in Mr. Ready's Exhibit 134 by merely making the necessary adjustment for increased county, state and Federal taxes resulting from increased operating revenue. We assume that there will be no dispute with reference to any of these figures with the exception that, as hereinbefore pointed out, the Commission disagrees with us as to the particular year in which Federal income taxes shall be reported. We believe that our view in this matter is correct and that complete reliance may be placed on the attached Appendix No. 3.

The items for "bond interest and retirement" are the actual requirements under the Company's bond mortgage and are shown in Exhibit 126—Haines (R. 460, 462-A). The total number of shares of stock outstanding at the beginning of 1938 likewise appears in Mr. Haines' exhibit.

The remaining figures are easily understood. The money remaining at the end of each year, after the other obligations to bondholders and stockholders have been met, is simply used to retire capital stock at $1.00 per share.

The exhibit shows that at the end of the franchise period in 1948, the revenues from the rates now fixed by the Commission will have failed to retire 437,167 shares of stock of the par value of $1.00 per share.

The exhibit further shows that said revenues will have failed to apply as much as a single dollar on the $2,404,600.00 of dividends at 8% which the Company failed to earn and declare during the period from May

21, 1927 to December 31, 1935. Said figure of $2,404,-600.00 includes nothing whatever for interest.

Finally, the exhibit shows unretired capital stock at $1.00 per share plus unpaid dividends, at the end of the franchise period, totaling $2,841,767.00.

It thus appears that under the tolls now fixed by the Commission, the Company will fail by a very large sum to earn sufficient revenue to enable it to meet its obligations to its bondholders and stockholders.

5. Under the Railroad Commission's tolls, appellant would fail in the sum of $2,663,766.00 to receive sufficient revenue to enable it to retire, by 1948, the money invested in its wasting assets, if a fair return throughout the term of the franchise is taken at 8 per cent, and in the sum of $7,142,576.00 if such return is taken at 9 per cent.

We shall now give further consideration to the subject of "wasting assets" by approaching the matter from a somewhat different angle.

In this connection, we have in mind the general principle that a public utility which owns and operates a wasting asset is entitled to receive sufficient revenue to enable it, after paying the usual expenses of operation, maintenance, replacements and taxes, and receiving a fair return on such portion of its investment as, from year to year, has not as yet been paid back, to *retire* the entire *investment* by the time the asset is completely wasted. The funds thus received are sometimes referred to as moneys received to take care of the *depletion* of the *wasting asset.*

Leaving the question whether the rates fixed by the Railroad Commission will yield sufficient revenue to

enable appellant to meet its obligations to its *bondholders* and *stockholders,* we shall now consider appellant's ability, under said rates, to retire its *investment* in its bridges prior to the expiration of appellant's franchises in 1948.

Our figures will be the *actual* figures for the years 1926 to 1937, inclusive, at the tolls heretofore in effect, as reported by Mr. Ready without any challenge whatever, in his Exhibit 132, Table 3 (R. 491, separately forwarded) and the *estimated* figures for the years 1938 to 1948, inclusive, based on exhibits of Mr. Ready and shown in statement entitled "Estimated Operating Results—American Toll Bridge Company—1938-1948—under Rates as per CRC Decision"—which statement is attached to this Brief as Appendix No. 3.

Our method will be as follows: From the gross revenue of each year we shall deduct the sum of the operating expenses and the Federal and State income taxes, thus ascertaining the amount remaining for fair return and for depletion of the investment. From said remainder, we shall then deduct a fair return at the rate of 9% on the amount of the investment remaining each year after the moneys available for retirement of investment have been deducted. The amount then remaining is the sum available for depletion or retirement of investment in that year.

This process will be followed, year by year, for each year from 1926 to 1948 (to the date of the expiration of the franchises), inclusive. We shall thus finally secure a figure which will be the amount of the unretired or undepleted investment in 1948. That figure

will be the amount by which the rates prescribed by the Railroad Commission will *fail* to have retired appellant's investment in its wasting assets by the date of the expiration of the franchises.

We shall then repeat the process, using, however, an 8% return in lieu of the 9% return to which we believe we have shown appellant to be entitled on the evidence in this case.

Attached to this Brief as Appendix No. 4, the Court will find the statement which we have thus prepared, entitled "Wasting Assets — American Toll Bridge Company—Effect of Rates prescribed by Railroad Commission on Company's ability to Retire the Investment".

With the exception of mere mathematical computations, the figures are all as testified to by Mr. Ready. With the exception of the question in which year Federal income taxes as actually paid shall be shown, to which matter we have hereinbefore referred, we understand that the figures are unchallenged.

As already stated, the figures for the years 1926 to 1937, inclusive, are the *actual* figures under the tolls heretofore in effect and the figures for the year 1938 to 1948, inclusive, are the *estimated* figures under the lower tolls established by the Commission.

To facilitate the Court's examination of the statement, we submit the following statement of the make-up of its various columns:

Column 1—Gross Revenue—

Exh. 132, Table 3, col. 2 for 1926 to 1937, incl., and Appendix No. 3 to this brief for 1938 to 1948, incl.

Column 2—Operating Expenses—

Exh. 132, Table 3, col. 3 for 1926 to 1937, incl., and Appendix No. 3 to this brief for 1938 to 1948, incl.

Column 3—Federal and State Income Taxes—

Exh. 132, Table 3, Col. 4 for 1926 to 1937 incl., and Appendix No. 3 to this brief for 1938 to 1948, incl.

Column 4—Total Operating Expenses plus Taxes.

Col. 2 plus col. 3.

Column 5—Net for Return and Depletion—

Col. 1 minus col. 4.

Column 6—Investment—average amount—

Exh. 132, Table 3, col. 1 for 1926 to 1948, incl.

Column 7—Investment less Depletion.

Col. 6 minus col. 10, except that no addition is made where the figures in col. 10 are "red", it being assumed that the wasting asset formula will retire early deficits without interest thereon.

Column 8—9% Return on Depleted Investment—

Return computed on col. 7 each year except that in 1927 it is computed on only such portion of investment as was actually in service and that in 1948 it is computed on only that portion of year up to the expiration of franchise as to each bridge.

Column 9—Amount available for Depletion of Investment, separately for each year—

Col. 5 minus col. 8.

Column 10—Amount available for Depletion of Investment, progressively accumulated, year by year—

From col. 9.

Columns 11, 12, 13 and 14 have been prepared on the assumption of a fair return of 8% per annum, in lieu of the 9% used in the preceding portion of the statement. These columns are the counterpart of columns 7, 8, 9 and 10, respectively.

By looking at the last figure in column 7, the Court will observe that, after making appropriate allowances for operating expenses, Federal and State income taxes and a return of 9 per cent per annum on the unretired portion of the investment, year by year, *the tolls in effect prior to 1938 plus those established by the Commission for the remaining years, will have failed to supply $7,142,576.00 of the funds necessary to retire the investment by 1948.*

Likewise, by looking at the last figure of column 11, the Court will observe that with a return of 8 per cent per annum, *said tolls will have failed to supply $2,663,766.00 of the funds necessary to retire the investment by 1948.*

We submit that nothing further is necessary to demonstrate the utter failure of the tolls fixed by the Railroad Commission to yield the revenues to which appellant is rightfully entitled so as to retire the investment in its wasting assets by the time the franchises expire in 1948.

6. Under the law of wasting assets, the tolls established by the Railroad Commission will confiscate appellant's property in its Carquinez and Antioch Bridges.

Bearing in mind the actual situation as we have developed it, and also Justice Cardozo's declaration in *Columbus Gas & Fuel Company v. Public Utilities Commission*, supra, that failure to make a proper allowance to a public utility for the depletion of its wasting assets *"is to take its property away from it without due process of law"*, we respectfully submit that the Railroad Commission's decision constitutes a clear case of denial of due process of law.

This point is in addition to and independent of each of the other points hereinbefore submitted.

D. CONCLUSION ON DENIAL OF DUE PROCESS—CONFISCATION.

We believe that we could well rest our case on either impairment of contract obligations or denial of procedural due process of law.

However, out of an abundance of caution, we have gone further and have tried, to the best of our ability, to set forth the facts in the record bearing on the additional issue of confiscation. We believe that we have shown——

1. Viewing the Carquinez Bridge separately, the Commission's order confiscated appellant's property in that bridge;

2. Turning then to appellant's unified transportation system, consisting of both the Carquinez and the Antioch Bridges, we have shown that the Commission's order failed to give a fair re-

turn on the fair value of the property and, accor-
ingly, is confiscatory; and

3. Under the law of wasting assets, the revenu
from the rates established by the Railroad Com-
mission will be (a) inadequate to enable appella
to meet its obligations to its bondholders and it
stockholders and (b) inadequate to enable appel-
lant to retire its investment by the date of th
expiration of its franchises in 1948.

For each of these reasons, the Commission's orde
is confiscatory.

CONCLUSION.

For each of the reasons hereinbefore in this Brie
stated, we respectfully submit that the judgment o
the Supreme Court of California should be reversed.

Dated at San Francisco, California, this 7th da
of April, 1939.

Respectfully submitted,

MAX THELEN,

Counsel for Appellant.

Appendix No. 1

ORDINANCE NO. 171.

An Ordinance Granting the Application of Rodeo-Vallejo Ferry Company, a Corporation, and Franchise to Erect, Construct and Maintain a Toll Bridge Across the Straits of Carquinez Between the County of Contra Costa and the County of Solano, State of California, and Take Tolls Thereon.

Before the Board of Supervisors of the County of Contra Costa, State of California.

In the matter of the application of Rodeo-Vallejo Ferry Company, a corporation, for authority to erect, construct and maintain a toll bridge and take tolls thereon across the Straits of Carquinez between Contra Costa County and Solano County, California.

The Board of Supervisors of the county of Contra Costa, State of California, do ordain as follows:

That the Rodeo-Vallejo Ferry Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the town of Rodeo, county of Contra Costa, State of California, having made its duly verified application in writing in due form of law to the Board of Supervisors of the county of Contra Costa for authority to erect, construct and maintain a toll bridge with the right, privilege and permission to take tolls thereon across the Straits of Carquinez between the county of Contra Costa and the county of Solano, in the State of California, as de-

scribed in the application of Rodeo-Vallejo Ferry Company, a corporation, therefor.

AND WHEREAS, the county of Contra Costa is the county on the left bank descending of the Straits of Carquinez the body of water or stream across which it is proposed to erect, construct and maintain said bridge, and

WHEREAS, this Board has jurisdiction to hear and act upon said application, and whereas the Board of Supervisors of the county of Contra Costa, on the 6th day of November, 1922, proceeded to hear and did hear the application of said Rodeo-Vallejo Ferry Company, a corporation, and continued the further hearing thereon from time to time to and until the 8th day of January, 1923, and said Board of Supervisors on the said 8th day of January, 1923, all members thereof being present, duly passed and adopted a resolution expressing its desire to grant the privilege permission and franchise to the Rodeo-Vallejo Ferry Company, a corporation, its successors and assigns to erect, construct and maintain a toll bridge across the Straits of Carquinez between the county of Contra Costa and the county of Solano in the State of California, and having found and determined therein the precise point where such bridge is proposed to be located in the manner prescribed by law, and this Honorable Board having thereupon notified W. F. McClure, State Engineer of the State of California, of such purpose and the precise point where such bridge is proposed to be located, and duly and regularly continued the further hearing of said application and the

hearing thereon to this 5th day of February, 1923, and said Engineer having in accordance with law designated the length of the spans necessary to permit the free flow of water in said Straits of Carquinez, there being no draw in said bridge, and having filed in writing his designation as aforesaid, with the Board of Supervisors in pursuance of law on this 5th day of February, 1923.

And now on this 5th day of February, 1923, it fully appearing to the satisfaction of this Board that due proof has been made that due and legal notice of said application of said Rodeo-Vallejo Ferry Company, a corporation, for the right and franchise to so erect, construct and maintain a toll bridge across said Straits and to take tolls thereon and the time and place fixed for the hearing thereof and thereon has been made and given in all things in the manner and for the time prescribed by law, and this Board having in open and regular session duly considered said application for such franchise and permission to take tolls thereon, now determines and finds that the application of said Rodeo-Vallejo Ferry Company, a corporation, is in all things as required by law, and that due and legal notice of said application has been given in the manner prescribed by law and that this Board has jurisdiction to hear and act upon said application and grant said franchise.

That said toll bridge across said Straits prayed for in said application of said Rodeo-Vallejo Ferry Company, a corporation, between the points and at the

location determined by this ard, is a public necessity.

That the expense of the erection, construction and maintenance of such a toll bridge as a free public highway is in the opinion of this Board and this Board so determines and finds too great to justify the erection, construction, and maintenance thereof by the counties of Contra Costa and Solano.

That said bridge is a public necessity. That in the opinion of the Board, the public good and interests require the construction of said bridge. That the public good and public necessity will be promoted by the erection, construction and maintenance of said bridge as proposed by the said Rodeo-Vallejo Ferry Company, a corporation.

That said Rodeo-Vallejo Ferry Company, is the owner of lands in Contra Costa County, California, hereinafter particularly described upon which the southern terminal of said bridge is to be located.

That the bridge as proposed to be erected by the Rodeo-Vallejo Ferry Company, a corporation, is of such type that it will not interfere with or obstruct navigation and will allow sufficient space or span to permit the safe, expeditious and convenient passage at all times of all vessels which may navigate said Straits.

That there is no toll bridge at the proposed location nor is there any bridge whatever across said Straits.

That there is no ferry operating across said Straits of Carquinez within a mile of the site of the proposed bridge, save and except that of said Rodeo-Vallejo Ferry Company, a corporation.

THEREUPON, it is by the Board of Supervisors of the County of Contra Costa, State of California, ordered, that said bridge is a public necessity; that the public good and interests require the construction thereof; that the public good and interest and public necessity will be promoted by the erection, construction and maintenance of said bridge.

That said bridge is to be erected, constructed and maintained in a straight line across the Straits of Carquinez, between the County of Contra Costa and the County of Solano, State of California, between the terminal points or locations hereinafter described.

That the application of the Rodeo-Vallejo Ferry Company, a corporation, is hereby granted, and that the Rodeo-Vallejo Ferry Company, a corporation, its successors and assigns is hereby granted the right, privilege, permission, authority and franchise to erect, construct and maintain a toll bridge with the right to take tolls thereon across the Straits of Carquinez between the County of Contra Costa and the County of Solano, State of California, in a straight line between the terminal points hereinafter particularly described, with the proper approaches thereto, for the term of twenty-five (25) years from and after the effective date of the ordinance granting said franchise.

It is hereby ordered that at the expiration of term hereby granted the title to said toll bridge shall revert to the Counties of Contra Costa and Solano.

Said Bridge to be constructed of concrete and steel and is to be of the suspension type or such other type as the War Department of the United States in its judgment may prescribe. It shall be of a height of one hundred thirty-five (135) feet in the clear above mean high water on said Straits, at all points between the southerly proposed new pierhead line as hereinafter described and the next pier north of said line. The breadth of the roadway of the said bridge shall be not less than thirty (30) feet. Said bridge shall be constructed in all things in accordance with the requirements of the United States War Department. No pier of said bridge nor any portion thereof nor any other obstruction below said 135 feet clearance shall be placed in the Straits of Carquinez between a straight line drawn from the northwest corner of the California & Hawaiian Sugar Refining Corporation's wharf and the northeast corner of Selby wharf (said line being the proposed new pierhead line to be established by the proper authorities of the United States) and a point one thousand (1000) feet northerly from said line.

That the location of the Contra Costa County terminal of said bridge is as follows:—

Portion of Location No. 229, State Tide Lands, Contra Costa County, lying within the southeast quarter of Section 31, Township 3 North, Range 3

West, M. D. B. & M., and more particularly described as follows, to-wit:

Beginning at a point on the southerly side of the Straits of Carquinez 14.36 chains north of the Southeast corner of Section 31, Township 3 north, range 3 west, Mount Diablo Meridian in the line of extreme low; thence south 5.07 chains to a station in the United States Bulkhead line; thence north 89° 17′ west running along said bulkhead line 5.57 chains to station; thence north 4.70 chains to station in low water line; thence north 87° east 5.58 chains into the place of beginning run by the true meridian, magnetic variation 17° 05′ east, containing 2.71 acres.

Also on that certain roadway situate in said county and state aforesaid and more particularly described as follows, to-wit:

Commencing at a point where the center line of First Avenue, Town of Valona, Contra Costa County, intersects the southerly shore of Carquinez Straits in southerly line of tideland survey No. 44, C. C. Co.; thence northerly 760 feet more or less crossing the lands of the Northern Railway Co. and lands formerly owned by Mrs. Muir and the State of California to the line of the tract of 2.71 acres above described. The above described line is the center line of a 40 foot roadway.

That the location of the Solano County Terminal of said bridge is as follows:

On that certain tract of land situated, lying and being in the county of Solano, State of California,

and known as the James Clyne Tract, located in the north half of Section 32 and the south half of Section 29, in Township 3 North, Range 3 West, M. D. B. & M., which said tract of land lies between the lands of the Pinole Dome Oil Company on the east and the lands of Antonio dos Reis and the lands of the Great Western Power Company on the west, and more particularly described as follows, to-wit:

Beginning at the point of intersection of the line of mean high water on the north shore of Carquinez Straits with the westerly line of the James Clyne Tract in Section 32, Township 3 North, Range 3 West, M. D. B. & M. (if the public land surveys of the United States be considered extended over said land), and running thence northerly along said westerly line of the James Clyne Tract, 600 feet to a point on said line; thence east 350 feet; thence north 550 feet more or less to said line of mean high water on the north shore of Carquinez Straits; and thence westerly along said line of mean high water to the point of beginning.

The precise point on the above described locations where such bridge is to be located is as indicated on sheet 2 accompanying report of W. F. McClure, State Engineer of the State of California, and dated February 1, 1923, and filed with the Board of Supervisors of Contra Costa County on the 5th day of February, 1923, reference to which is hereby made as a part hereof, and is particularly described as follows, to-wit:

The bridge axis or center line is fixed by a straight line passing through the two following points:

1. Point P, which is the intersection of the bridge axis with the property line between James Clyne and the Great Western Power Company on the Solano shore. This point P is 410 feet from a point marked Q and measured along the boundary between the James Clyne property and that of the Great Western Power Company. This line bears south 32° west. The Point Q is the intersection corner common to the properties of James Clyne, the Great Western Power Company and Manuel and Antonio dos Reis.

2. Point R, shown on Sheet No. 2, on the Contra Costa side along the front property line of the Rodeo-Vallejo Ferry Company, which line bears north 87° east. The point R is 120 feet westerly along this line from the northeast corner of the Rodeo-Vallejo Ferry Company's property location No. 229, 2.71 acres. This northeast corner of the Ferry Company's property is 14.36 chains north of the intersection point common to Sections 5, 6, 31 and 32.

That a penal bond be given by the Rodeo-Vallejo Ferry Company, a corporation, for the benefit of the county and all persons crossing or desiring to cross said bridge, in the sum of Twenty-five thousand (25,000) dollars, conditioned as required by law, said bond to be given at least ten days before the operation of said bridge and the taking of tolls thereon.

That the Rodeo-Vallejo Ferry Company, a corporation, give bond to the County of Contra Costa in the sum of Fifty thousand (50,000) dollars guaranteeing the faithful performance of all the terms and

provisions of the ordinance granting franchise herein, said bond to be given within thirty days after the ordinance granting this franchise becomes effective, said bond not to be effective until after approval of said bridge and franchise by the War Department of the United States.

That the license tax to be paid by the Rodeo-Vallejo Ferry Company, a corporation, its successors and assigns, for taking tolls on said bridge shall be One hundred (100) dollars per month payable annually, commencing from date of the operation of the said bridge. That two (2%) per cent of the gross receipts derived from the use and operation of said bridge shall also and in addition be paid to the County of Contra Costa for the benefit of the counties of Contra Costa and Solano for the use of said franchise.

The actual construction of said bridge in good faith, shall be started within four months from the date of this Ordinance granting said franchise and shall be completed within three years thereafter, or such further time as may be granted by the Board of Supervisors.

It is further ordered that the rate of tolls which may be collected for crossing said bridge shall be as fixed by the Railroad Commission of the State of California, and that in the event said Railroad Commission shall fail to fix such tolls then it is hereby further ordered that the rate of tolls which may be collected for crossing said bridge shall be as follows:

Automobiles

	Rate
Ambulance, self-propelled or horse-drawn	$0.75
Automobiles	.75
Automobile passenger busses	1.50

Bicycles

Bicycle accompanied by owner. Each	.25

Carts and Wagons

Cart or wagon without horse	.75
Push carts (attendant and freight extra). Each	.25

Commercial or Delivery Automobiles and Motor Trucks

Not exceeding 2 tons capacity. Each	1.00
Exceeding 2 tons capacity. Each	1.50

Ditchers, Harvesters, etc.

Ditchers, harvesters, steam rollers, tractors and all similar conveyances, machines and vehicles charged on a basis of weight, per ton of 2,000 pounds, at carrier's convenience. Ton	1.60

Cattle and Stock

Cattle per head and stock in herds and uncrated, including one attendant. Each	.50
Sheep and swine uncrated and in herds, including one attendant. Each	.35

Commutation Rates

Motor stages operated daily over a fixed route (minimum charge per day $10.00 per trip, includes driver but no passengers)	.50
Daily round trip for automobiles and driver, per month	25.00

Freight

Freight of all kinds on vehicles per 1,000 lbs. (minimum charge 20 cents)	.40

Hearses

Hearses, self-propelled or horse-drawn (with or without casket and corpse)	1.25

Horses

Horse and wagon or cart, or pleasure vehicle	1.00
Two horses and wagon, or pleasure vehicle	1.50
Two horses and dray, or truck or commercial vehicle	1.75
One horse or draft animal, not attached to vehicle. Each	.50
Each horse over two attached to vehicle. Each	.50

Motorcycles

Motorcycles. Each	.25
Motorcycles with side car. Each	.50

Trailers

Two-wheel trailers attached to automobiles	.50
Four-wheel trailers attached to automobiles or trucks (camping equipment in trailers charged as freight)	.75

Passengers

Passengers, drivers of vehicles and pedestrians, one way	.15
Passengers, drivers of vehicles and pedestrians, round trip	.25

Commutation Rates

Passengers, drivers of vehicles and pedestrians, per month 3.00

Said bridge shall be constructed in accordance with the requirements of the United States War Department.

It is further ordered that this ordinance be published before the expiration of fifteen days after the passage thereof, together with the names of the members of the Board voting for and against the same for at least one week in the Contra Costa Gazette, a newspaper printed and published in the County of Contra Costa.

This ordinance shall become effective thirty days from and after its passage.

The foregoing ordinance was adopted this 5th day of February, 1923, by the following vote:

Ayes—Supervisors, Zeb Knott, C. H. Hayden, W. J. Buchanan and R. J. Trambath.

Noes—Supervisors, none.

Absent—Supervisors, J. P. Casey.

W. J. Buchanan,
Chairman of the Board of Supervisors of the County of Contra Costa.

Attest:

J. H. Wells,
Clerk of Board of Supervisors.

(Seal of Board)

Appendix No. 2

STATUTES OF 1937, CH. 896, PP. 2473, 2478.

An act to amend section 2 of the Public Utilities Act, relating to the definition of public utilities, and definitions of other terms used in said act, and including and defining toll bridges and toll bridge corporations as public utilities.

(Approved by the Governor, July 1, 1937. In effect August 27, 1937.)

The people of the State of California do enact as follows:

SECTION 1. Section 2 of the Public Utilities Act is hereby amended to read as follows:

"SEC. 2. * * *

"(dd) The term 'public utility,' when used in this act, includes every common carrier, toll bridge corporation, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger, warehouseman, and heat corporation, where the service is performed for or the commodity delivered to the public or any portion thereof.

"(ee) The term 'toll-bridge corporation,' when used in this act, includes every private corporation or private person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any bridge or appurtenance thereto, used for the transportation of persons or property for compensation in this State."

EST
AMERICA
U

	1938	1939	1940
1. Operating Revenue	$1,250,339	$1,270,256	$1,290,173
2. Total Direct & General Expenses	284,584	284,983	285,711
3. State Franchise & ~~Federal Inc. Tax~~	114,548	45,129	51,198
4. TOTAL:	399,132	330,112	336,909
5. NET:	851,207	940,144	953,264
6. Bond Interest	88,431	162,550	144,833
7. Bond Retirement	245,167	406,663	420,417
Total:	333,598	569,213	565,250
8. Balance for Div. & Stock Retirements	517,609	370,931	388,014
9. Dividend @ 8% on Par Value of Stock less Refunds	302,150	284,913	278,032
10. Stock, Beginning of Year	3,776,873	3,561,414	3,475,396
11. Stock, Retired	215,459	86,018	109,982
12. Dividends @ 8% per annum for Period June 1, 1927 to Dec. 31, 1935 (without Interest on Same) Exh. 126			
13. Unretired Stock plus Unpaid Dividends as of End of Franchises			

Appendix No. 3

ESTIMATED OPERATING RESULTS
IERICAN TOLL BRIDGE COMPANY—1938-1948
Under Rates as per CRC Decision

1940	1941	1942	1943	1944	1945	1946	1947	1948	Total
1,290,173	$1,312,083	$1,335,983	$1,357,892	$1,379,801	$1,401,709	$1,423,618	$1,445,527	$210,067	$13,677,448
285,711	286,149	282,827	268,196	268,634	269,072	269,840	270,278	58,185	2,828,459
51,198	57,698	69,123	80,645	98,762	115,652	131,219	140,529	148,135	1,052,638
336,909	343,847	351,950	348,841	367,396	384,724	401,059	410,807	206,320	3,881,097
953,264	968,236	984,033	1,009,051	1,012,405	1,016,985	1,022,559	1,034,720	3,747	9,796,351
144,833	122,260	98,198	72,715	45,902	17,325	—	—	—	752,214
420,417	448,125	474,708	499,375	519,583	315,000	—	—	—	3,329,038
565,250	570,385	572,906	572,090	565,485	332,325	—	—	—	4,081,252
388,014	397,851	411,127	436,961	446,920	684,660	1,022,559	1,034,720	3,747	5,715,099
278,032	269,233	258,944	246,769	231,554	214,324	176,698	109,029		2,371,646
3,475,396	3,365,414	3,236,796	3,084,613	2,894,421	2,679,055	2,208,719	1,362,858	437,167	437,167
109,982	128,618	152,183	190,192	215,366	470,336	845,861	925,691		3,339,706
									2,404,600
									2,841,767

Appendix No. 4

WASTING ASSETS—AMERICAN TOLL BRIDGE COMPANY
Effect of Rates Prescribed by Railroad Commission on Company's Ability to Retire the Investment

Year	Gross Revenue	Operating Expenses	Federal and State Income Taxes	Expenses Plus Taxes	Net For Return & Depletion	Investment Average Amount	9% BASIS				8% BASIS			
							Investment Less Depletion	9% Return on Depleted Investment	Amount Available for Depletion of Investment		Investment Less Depletion	8% Return on Depleted Investment	Amount Available for Depletion of Investment	
									For Year	Accumulated			For Year	Accumulated
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)
1926	$ 92,334	$ 61,981	$ 2,455	$ 64,436	$ 27,898	$1,542,941	$1,542,941	$138,865	$110,967*	$110,967*	$1,542,941	$123,435	$ 95,537*	$ 95,537*
1927	734,861	227,222	5,647	232,869	501,992	8,751,923	8,751,923	521,185	19,193*	130,160*	8,751,923	463,276	38,716	56,821*
1928	1,122,715	363,754	—	363,754	758,961	9,074,486	9,074,486	816,704	57,743*	187,903*	9,074,486	725,959	33,002	23,819*
1929	1,252,073	339,666	—	339,666	912,407	9,260,783	9,260,783	833,470	78,937	108 966*	9,260,783	740,863	171,544	147,725
1930	1,369,050	316,566	9,470	326,036	1,043,014	9,498,583	9,498,583	854,872	188,142	79,176	9,350,858	748,069	294,945	442,670
1931	1,316,396	332,757	30,774	363,531	952,865	9,675,372	9,596,196	863,657	89,208	168,384	9,232,702	738,616	214,249	656,919
1932	1,105,170	307,567	14,295	321,862	783,308	9,691,565	9,523,181	857,086	73,778*	94,606	9,034,646	722,772	60,536	717,455
1933	1,023,907	295,103	9,789	304,892	719,015	9,688,535	9,593,929	863,453	144,438*	49,832*	8,971,080	717,686	1,329	718,784
1934	1,074,171	264,079	1,057	265,136	809.035	9,683,996	9,683,996	871,560	62,525*	112,357*	8,965,212	717,217	91,818	810,602
1935	1,176,194	319,865	10,235	330,100	846,094	9,683,667	9,683,667	871,530	25,436*	137,793*	8,873,065	709,845	136,249	946,851
1936	1,441,230	272,848	13,689	286,537	1,154,693	9,685,877	9,685,877	871,730	282,963	145,170	8,739,026	699,122	455,571	1,402,422
1937	1,678,174	375,177	66,223	441,400	1,236,774	9,688,895	9,543,725	858,935	377,839	523,009	8,286,473	662,918	573,856	1,976,278
1938	1,250,339	284,584	114,548	399,132	851,207	9,688,895	9,165,886	824,930	26,277	549,286	7,712,617	617,009	234,198	2,210,476
1939	1,270,256	284,983	45,129	330,112	940,144	9,688,895	9,139,609	822,565	117,579	666,865	7,478,419	598,274	341,870	2,552,346
1940	1,290,173	285,711	51,198	336,909	953,264	9,688,895	9,022,030	811,983	141,281	808,146	7,136,549	570,924	382,340	2,934,686
1941	1,312,083	286,149	57,698	343,847	968,236	9,688,895	8,880,749	799,267	168,969	977,115	6,754,209	540,337	427,899	3,362,585
1942	1,335,983	282,827	69,123	351,950	984,033	9,688,895	8,711,780	784.060	199,973	1,177,088	6,326,310	506,105	477,928	3,840,513
1943	1,357,892	268,196	80,645	348,841	1,009,051	9,688,895	8,511,807	766,063	242,988	1,420,076	5,848,382	467,870	541,181	4,381,694
1944	1,379,801	268,634	98,762	367,396	1,012,405	9,688,895	8,268,819	744,194	268,211	1,683,287	5,307,201	424,576	587,829	4,969,523
1945	1,401,709	269,072	115,652	384,724	1,016,985	9,688,895	8,000,608	720,055	296,930	1,985,217	4,719,372	377,550	639,435	5,608,958
1946	1,423,618	269,840	131,219	401,059	1,022,559	9,688,895	7,703,678	693,331	329,228	2,314,445	4,079,937	326,395	696,164	6,305,122
1947	1,445,527	270,278	140,529	410,807	1.034,720	9,688,895	7,374,450	663,701	371,019	2,685,464	3,383,773	270,702	764,018	7,069,140
1948	210,067	58,185	148,135	206,320	3,747	9,688,895	7,003,431	142,892	139,145*	2,546,319	2,619,755	47,758	44,011*	7,025,129
	Extent of deficiency in retirement of investment						$7,142,576				$2,663,766			

* Denotes red figure.